# MISSISSIPPI LAW JOURNAL

**STATE SOVEREIGNTY AND THE DRAFTING OF THE CONSTITUTION – I**

*William P. Murphy*

**THE SHORT-TERM TRUST**

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*May 1960*

VOLUME XXXI NUMBER 3

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# STATE SOVEREIGNTY AND THE DRAFTING OF THE CONSTITUTION—I†

*William P. Murphy* *

The purpose of this article is to examine, in general and in particular, the work of the Constitutional Convention, and to ascertain, by reference to specific provisions and the debate or discussion which accompanied their adoption, the extent to which and the manner in which the nationalist philosophy of the Founding Fathers was reflected in the Constitution, and the extent to which and the manner in which this nationalism was tempered by considerations based on state sovereignty.

## SUMMARY OF THE PROGRESS OF THE CONVENTION

The Convention was formally organized on Friday, May 25, 1787, George Washington was unanimously elected president, and a committee headed by George Wythe was appointed to draw up standing rules to govern the proceedings. Monday was devoted to discussion and adoption of the committee's report, and it was not until Tuesday, May 29, that the Convention began its deliberations. On this date "Mr. Randolph (then) opened the main business." What was needed, Randolph said, was a government "to secure 1. against foreign invasion; 2. against dissentions between members of the Union, or seditions in particular states; 3. to procure to the several states various blessings, of which an isolated situation was incapable; 4. to be able to defend itself against encroachments; and 5. to be paramount to the state constitutions." In speaking of the defects of the Articles of Confederation, Randolph "professed a high respect for its authors, and considered them as having done all that patriots could do, in the then infancy of the science of constitutions," and recognized that "perhaps nothing better could be obtained from the jealousy of the states with regard to their sovereignty." Enumerating the defects of the Articles, he included the following: "2. that the federal

†This article continues a study which began with *State Sovereignty Prior to the Constitution,* 29 Miss. L. J. 115 (1958), and continued with *State Sovereignty and the Founding Fathers,* 30 Miss. L. J. 135 (1959), 30 Miss. L. J. 261 (1959), and 31 Miss. L. J. 50 (1959). The footnote references are to Farrand, The Records of the Federal Convention (rev. ed. 1937) in four volumes.

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government could not check the quarrels between states, nor a rebellion in any, not having constitutional power nor means to interpose according to the exigency . . . 4. that the federal government could not defend itself against the encroachments from the state; 5. that it was not even paramount to the state constitutions, ratified as it was in many of the states."[1]

As a remedy for the existing state of affairs, Randolph then offered the Virginia plan,[2] consisting of a series of fifteen resolutions, which had been drawn up by that state's delegates prior to the opening of the Convention, and of which James Madison was the principal architect. Of particular relevance to the issue of national supremacy and state sovereignty with which we are concerned were the following proposals: a "National Legislature" of two houses in which state representation would be based either on the number of free inhabitants or the amount of property; power in this legislature " to enjoy the Legislative rights vested in Congress by the Confederation and moreover to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation;" power "to negative all laws passed by the several states, contravening in the opinion of the National Legislature the articles of Union;" and power "to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof;" a "National Executive" armed with "a general authority to execute the National laws" and also "to enjoy the executive rights vested in Congress by the Confederation;" a "National Judiciary" holding office during good behavior, whose jurisdicton was to extend "to questions which may involve the national peace and harmony;" and a requirement that "the legislative, executive and judiciary powers within the several states ought to be bound by oath to support the articles of Union."

Resolving itself next day into a committee of the whole, the Convention considered the Virginia plan for two weeks, and on June 13 reported favorably nineteen resolutions. These resolutions included all of the proposals set forth in the preceding paragraph, with one exception: the power to call forth the armed force of the Union against a state was omitted. In all other respects the nationalist features of the Virginia plan were approved. On June 14 Paterson of New Jersey took the floor and "observed to the Convention that it was the wish of several deputations, particularly that of New Jersey, that further time might be allowed them to contemplate the plan reported from the committee of the whole, and to digest one purely federal, and contradistinguished from the reported plan."[3] The next day Paterson laid before the Convention the

1 1 Records 18-19.
2 1 Records 20-22.
3 1 Records 240.

New Jersey plan,[4] consisting of nine resolutions.

A comparison of the essential features of the New Jersey plan with the Virginia plan reveals the following significant differences. The New Jersey plan proposed that "the Articles of Confederation ought to be so revised, corrected and enlarged, as to render the federal Constitution adequate to the exigencies of government," thus contemplating the retention of a confederation type government rather than the creation of a national government. No provision was made for any change in the structure of Congress or the basis of its representation; the New Jersey plan thus would have continued the unicameral Congress provided under the Articles, a Congress which was merely the agent of the states and in which each state had one vote. The New Jersey plan would have provided only modest and express increases in the power of Congress: a limited revenue power in the form of duties on imports, stamp taxes, and postage fees, supplemented by a continuation of the state requisition system with additional powers of collection; and a power to pass acts for the regulation of trade and commerce with foreign nations and between the states themselves. A "federal executive" was provided for with "general authority to execute the federal acts," but it was to be a plural executive appointed by Congress and removable by Congress on the application of a majority of the state governors. A "federal judiciary" of judges holding office during good behavior was provided, but its jurisdiction was limited commensurately with the power of Congress. The sixth New Jersey resolution provided for the supremacy of all acts of Congress and all treaties of the United States over state laws, and authorized the executive to "call forth the power of the confederated states" to compel obedience by recalcitrant states or individuals.

In order that the New Jersey plan might be given "fair deliberation" it was referred to the committee of the whole, and "in order to place the two plans in due comparison," the Virginia plan was recommitted.[5] The Convention thus had before it a clear-cut choice between two systems—on the one hand, a national government of virtually unlimited powers, armed with a complete and aboslute supremacy over the states, and on the other, a confederation in which the central authority had enforceable supremacy only in sharply limited areas, with the states retaining their sovereignty in all others. For three days the Convention considered the New Jersey plan. Paterson and Lansing defended it, the latter declaring that the two plans involved "principles directly in contrast; that of Mr. Paterson . . . sustains the sovereignty of the respective states, that of Mr. Randolph destroys it."[6] Hamilton, Wilson, and Madison—the advanced nationalists—spoke strongly against the New Jersey plan. Then, on June

[4] 1 Records 242-245.
[5] 1 Records 242.
[6] 1 Records 249.

19, King moved that "Mr. Randolph's propositions be re-reported without alteration which was in fact a question whether Mr. Randolph's should be adhered to as preferable to those of Mr. Paterson."[7] The Convention voted, and made its choice: seven states aye—Massachusetts, Connecticut, Pennsylvania, Virginia, North Carolina, South Carolina, and Georgia; three states nay—New York, New Jersey, and Delaware; one state, Maryland, divided. Thus, three weeks after it began its deliberations, the Convention rejected the continuation of a system based on state sovereignty and made its decision in favor of a system based on national supremacy. It was a decision which was never changed.

With this fundamental determination made, the Convention next proceeded to consider the nineteen resolutions reported by the committee of the whole which, as has been noted, included all but one of the nationalist features of the original Virginia plan. Quickly it became apparent that there was a sharp conflict of opinion on the question of representation in Congress. The larger states insisted on representation based on population, which would have given them dominance of the new government. The small states, not wishing to be overwhelmed by numbers, insisted on equality of representation, which had been the rule in Congress under the Articles. By July 2, the Convention had reached an impasse on this question; as Sherman tersely put it, "We are now at a full stop."[8] To resolve the matter a committee was appointed—consisting of Gerry, Franklin, Mason, Davie, Rutledge, Ellsworth, Yates, Paterson, Bedford, Martin and Baldwin—and the Convention adjourned over the holiday until July 5. On this day the committee reported its recommendations, which offered a compromise in which representation was to be based on population in the first house, but each state was to have an equality of vote in the second house. Debate then continued, but finally, on July 16, the compromise was adopted by the close vote of five states to four—Connecticut, New Jersey, Delaware, Virginia and North Carolina voting yes, Pennsylvania, Maryland, South Carolina and Georgia voting no, and one state, Massachusetts, being divided.

Debate then continued on the resolutions of the committee of the whole until July 26. By this time the Convention had adopted twenty-three resolutions which were referred to a Committee of Detail which was "to report a Constitution conformable to the Resolutions passed by the Convention."[9] It is important to note that these resolutions included all of the nationalist features which had been found in the resolutions of the committee of the whole. The Convention then adjourned until August 6 so that the Committee of Detail might have time to prepare

[7] 1 Records 322.
[8] 1 Records 511.
[9] 2 Records 106.

a draft of a Constitution. The Committee which was thus assigned the task of drawing up the first form of the Constitution of the United States was composed of Rutledge, Randolph, Ellsworth, Gorham and Wilson—three "moderate" and two "advanced" nationalists. The report which this committee submitted on August 6 was a document consisting of a preamble and twenty-three articles, many of which were broken down into separate sections totaling forty-one. In general and in most particulars this first draft of the Constitution conformed to the resolutions referred to the committee by the Convention; in some instances, however, the committee had made substantive changes on its own. The most striking developments which had been wrought during this stage were: the transformation of the broad indefinite, general legislative power of Congress into an enumeration of expressly delineated powers; the inclusion of certain specific prohibitions on Congressional power; the transformation of the broad, almost unlimited jurisdiction of the national judiciary into a specification of subjects of jurisdiction; and the inclusion of additional restrictions on the powers of the states.

On August 6 the Convention resumed its deliberations, now focussed upon the draft Constitution reported by the Committee of Detail. Article by article and section by section the Convention meticulously considered the draft. For over a month the detailed process of revision, modification, elaboration and correlation continued. Finally, on September 10, the Convention turned its work over to a Committee of Style and Arrangement to prepare a final draft which would put the Convention's decisions in orderly form and precise phraseology. This Committee of Style was composed of Johnson, Hamilton, Gouverneur Morris, Madison and King—three "advanced" and two "moderate" nationalists. As has been previously noted, this final draft was virtually the sole handiwork of Gouverneur Morris, who completed the task—incredibly—in two days. When one considers that these were the words over which subsequent generations of Americans were to debate all over again the issues of "national supremacy" and "state sovereignty," the circumstance that they were written by one of the most advanced nationalists in the Convention is obviously of enormous historical and legal significance. Receiving the report of the Committee of Style on Wednesday, September 12, the Convention spent four days considering its provisions, time consumed principally in rejecting proposed alterations. On Saturday, September 15, "on the question to agree to the Constitution, as amended, all the states, aye. The Constitution was then ordered to be engrossed."[10] On Monday, September 17, thirty-nine delegates signed the Constitution on behalf of the twelve states represented, and the Convention adjourned.

[10] 2 Records 633.

## A NATIONAL GOVERNMENT

On May 30, the day after the Virginia plan was presented, the Convention, acting as a committee of the whole, approved its very first resolution, which was: "that a national government ought to be established consisting of a supreme Legislative, Executive and Judiciary."[11] On May 31, resolutions were approved in favor of a "National" legislature chosen by popular election invested with both an indefinite legislative power and a negative on state laws. On June 1 the Convention adopted resolutions that a "National" executive be instituted armed with general authority to carry into effect the "national" laws. On June 4 a resolution was adopted that a "National" judiciary be established. Less than a week, therefore, after it commenced its deliberations the Convention had approved the necessary structure for the type of government desired by the group of nationalists who had brought about the Convention and who composed its membership almost in entirety. Throughout the rest of the Convention, whenever reference was made to the government being set forth in the new Constitution, it was constantly referred to as a "national" government. Today we refer to our system as a "federal" system and to the United States government as the "federal" government. To the Founding Fathers, however, the word "federal" meant something entirely different. They used the term "federal" as descriptive of the type government which existed under the Articles, i.e., a compact or league of states which were de jure and de facto sovereign, in which the central "government" was no more than the subordinate common agent of sovereign states. It was this kind of government, as we have seen, which the nationalists were determined to eradicate and replace, and in distinction to it and as descriptive of the kind of government they favored, they used the term "national."

Just what was the difference in the minds of the Founders when they referred to a "national" government as opposed to a "federal" government? It is not surprising that it is Madison, the "father of the Constitution," who discussed the matter most fully in the Convention. On May 30, on the question of the basis of representation in Congress, "Mr. Madison observed that whatever reason might have existed for the equality of suffrage when the Union was a federal one among sovereign states, it must cease when a National Government should be put into the place. In the former case, the acts of Congress depended so much for their efficacy on the cooperation of the states, that these had a weight both within and without Congress, nearly in proportion to their extent and importance. In the latter case, as the acts of the General Government would take effect without the intervention of the state legislatures, a vote from a small state would have the same efficacy and importance as a vote from

[11] 1 Records 35.

a large one, and there was the same reason for different numbers of representatives from different states, as from counties of different extents within particular states."[12] On June 6, advocating popular election of Congress, Madison was recorded by Yates as stating that "when we agreed to the first resolve of having a national government, consisting of a supreme executive, judicial and legislative power, it was then intended to operate to the exclusion of a federal government, and the more extensive we made the basis, the greater probability of duration, happiness and good order."[13] On June 7 King's notes record Madison as stating that "We are about to form a National Government and therefore must abandon ideas founded in the plan of confederation."[14]

On June 19 Madison left no doubt as to what sort of plan of government was being consciously abandoned. Describing a "federal" plan, Madison stated that: "One characteristic was that in a federal government, the power was exercised not on the people individually; but on the people collectively, on the states . . . . The other characteristic was, that a federal government derived its appointments not immediately from the people, but from the states which they respectively composed."[15] On June 28 he stated that "The fallacy of the reasoning drawn from the equality of sovereign states in the formation of compacts, lay in confounding mere treaties, in which were specified certain duties to which the parties were to be bound . . . with a compact by which an authority was created paramount to the parties, and making laws for the government of them."[16] Later, on July 23, he said that "He considered the difference between a system founded on the legislatures only, and one founded on the people, to be the true difference between a league or treaty, and a Constitution."[17] On July 14, in opposing equality of representation, Madison emphasized the truly national character of the new government. "But it had been said that the Government would in its operation be partly federal, partly national; that although in the latter respect the representatives of the people ought to be in proportion to the people, yet in the former it ought to be according to the number of states. If there was any solidity in this distinction he was ready to abide by it, if there was none it ought to be abandoned. In all cases where the General Government is to act on the people, let the people be represented and the votes be proportional. In all cases where the Government is to act on the states as such, in like manner as Congress now acts on them, let the states be represented and the votes be equal. This was the true ground of compromise if there was any ground at all.

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12 1 Records 37.
13 1 Records 141.
14 1 Records 158.
15 1 Records 314.
16 1 Records 446.
17 2 Records 93.

But he denied that there was any ground. He called for a single instance in which the General Government was not to operate on the people individually. The practicability of making laws, with coercive sanctions, for the states as political bodies, had been exploded on all hands."[18]

In later years Madison reiterated this point of view. In a letter written in 1826, he said hat the term "national" was used "not in contradistinction to a limited, but to a federal government. As the latter operated within the extent of its authority through requisitions on the confederated states, and rested on the sanction of the state legislatures, the government to take its place was to operate within the extent of its powers directly and coercively on individuals, and to receive the higher sanction of the people of the states."[19] In a letter written in 1831, he stated that "the term National as contradistinguished from Federal was not meant to express more that that the powers to be vested in the new Government were to operate as in a National government directly on the people, and not as in the old confederacy on the states only."[20] And in a letter in 1833, discussing the term "national," he wrote: "In the first place. It contradistinguished the proposed government from the confederacy which it was to supersede. Second. As the system was to be a new and compound one, a nondescript without a technical appellation for it, the term National was very naturally suggested by its national features. 1. In being established not by the authority of state legislatures but by the original authority of the people. 2. In its organization into legislative, executive and judiciary departments. and 3. In its action on the people of the states immediately, and not on the government of the states, as in a confederacy."[21]

Madison's conception of a "national" government, then, was one whose powers were to be exercised directly upon individuals without any "intervention of the state legislatures," and enforceable through its own agencies rather than through the states. Such a government could never be formed upon any league of sovereign states; it could be brought into existence and operation only through a Constitution "founded on the people." That Madison's view expressed the general understanding of the Convention is clear. Not a single delegate took issue with it during the Convention; on the contrary, each delegate who addressed himself specifically to the subject revealed a coincidence of opinion with Madison. Thus, on June 16 Randolph stated that "The true question is whether we shall adhere to the federal plan, or introduce the national plan. The insufficiency of the former has been fully displayed by the trial already made.... We must resort therefore to a national legislation over indivi-

182 Records 8.
193 Records 473.
203 Records 517.
213 Records 529.

duals. . . ."[22] And Mason on May 30 "observed that the present confederation was not only deficient in not providing for coercion and punishment against delinquent states, but argued very cogently that punishment could not, in the nature of things, be executed on the states collectively, and therefore that such a government was necessary as could directly operate on individuals, and would punish those only whose guilt required it."[23] On June 6 Mason stated: "Under the existing confederacy, Congress represents the states, not the people of the states. Their acts operate on the states, not on the individuals. The case will be changed in the new plan of government. The people will be represented, they therefore ought to choose the representatives."[24]

On May 30 "Mr. Gouverneur Morris explained the distinction between a federal and national, supreme Government, the former being a mere compact resting on the good faith of the parties, the latter having a complete and compulsive operation. He contended that in all communities there must be one supreme power, and only one."[25] On June 25, opposing election of Congress by state legislatures, Wilson said that "In explaining his reasons it was necessary to observe the twofold relation in which the people would stand. 1. As citizens of the General Government. 2. As citizens of their particular state. The General Government was meant for them in the first capacity, the State Governments in the second. . . . The General Government is not an assemblage of states, but of individuals for certain political purposes—it is not meant for the states, but for the individuals composing them. The individuals, therefore, not the states, ought to be represented by it."[26] Hamilton, on June 18, referring to the Virginia plan, stated that "The plan last proposed departs from the federal idea, as understood by some, since it is to operate eventually on individuals."[27] And Lansing, speaking of the New Jersey plan, said that "this system is fairly contrasted with the one ready to be reported—the one federal, and the other national. In the first, the powers are exercised as flowing from the respective state governments—The second, deriving its authority from the people of the respective states, which latter must ultimately destroy or annihilate the state governments."[28] King on June 11 "observed that it would be better first to establish a principle, that is to say, whether we will depart from federal grounds in forming a national government."[29] On June 19 he declared that "A Union of the States is a union of the men composing them, from whence a national

[22] 1 Records 255.
[23] 1 Records 34.
[24] 1 Records 133.
[25] 1 Records 34.
[26] 1 Records 405-6.
[27] 1 Records 283.
[28] 1 Records 257.
[29] 1 Records 204.

character results to the whole. Congress can act alone without the states —they can act and their acts will be binding against the instructions of the states."[30] And on July 14 he said that "He considered the proposed government as substantially and formally, a general and national government over the people of America. There never will be a case in which it will act as a federal government on the states and not on the individual citizens."[31]

Attention should be given to the action of the Convention on June 20. On this date the first proposition of the committee of the whole came up for debate, and Ellsworth "moved to alter it so as to run 'that the government of the United States ought to consist of a supreme legislative, executive, and judiciary.' This alteration, he said, would drop the word national, and retain the proper title 'the United States' "[32] Without debate the motion was agreed to, and the question may be asked: did this action mean that the Convention had abandoned its commitment to a "national" government? It is clear from the subsequent proceedings that the change was in nomenclature only, and not in substance. Years later Madison gave the explanation. In a letter in 1826, he wrote: "With respect to the term 'national' as contradistinguished from the term 'federal,' it was not meant to express the extent of power, but the mode of its operation, which was to be not like the power of the old Confederation operating on states; but like that of ordinary government, operating on individuals; and the substitution of 'United States' for 'national' noted in the journal, was not designed to change the meaning of the latter, but to guard against a mistake or misrepresentation of what was intended."[33] Again, writing in 1831, Madison stated: "Some exulting inferences have been drawn from the change noted in the Journal of the Convention, of the word National into 'United States.' The change may be accounted for by a desire to avoid a misconception of the former, the latter being preferred as a familiar caption. That the change could have no effect on the real character of the government was and is obvious; this being necessarily deduced from the actual structure of the government and the quantum of its powers."[34]

To summarize on this point, it is clear that the Founding Fathers intended that the Constitution should establish a "national" government to replace the "federal" system of the Articles; that whereas the "federal" system had operated on and through the states, the new "national" government was to operate directly on individuals; and finally, that the foregoing results were to be accomplished without the participation and intervention of the individual states.

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301 Records 323.
312 Records 6.
321 Records 335.
333 Records 474.
343 Records 517.

## A NATIONAL LEGISLATURE

### A Bicameral Body.

Article I, Section I of the Constitution provides that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." There was thus established a bicameral legislature, in contrast to the unicameral Congress which had existed under the Articles of Confederation. Following the example of Parliament, all the colonial assemblies and all the succeeding state legislatures, excepting only Pennsylvania and Georgia, were composed of two houses. The Continental Congress, on the other hand, both before and after the adoption of the Articles, was always one house only. The reason for the difference lay in the different nature of the governmental systems of which each was a part. The state legislatures represented the people of the state and enacted laws which were operative directly upon individuals within the state. Having two houses in the legislature, each of which could act as a check on the other and with the concurrence of both necessary to the enactment of legislation, was some assurance against undue accumulation and power and the passage of unwise or oppressive laws. A bicameral legislature was considered necessary as a means of protection of individuals against legislative power which operated directly upon them. The Congress created by the Articles of Confederation, however, did not operate (except in a few minor instances) directly upon individuals. The system of government under the Articles was, as we have seen, merely a compact or league of sovereign states. the enactments of Congress being operative only on states and enforceable only by states. A unicameral Congress in which each state was equally represented was therefore a body sufficient to the purposes of the Articles and also one in which each state was amply protected.

With the abolition of a system based on state sovereignty and the creation of a national government whose powers were to be operative directly on individuals, it was desirable that those individuals should be afforded some assurance and protection against abuse of those powers by the provision for a bicameral legislature. This purpose was expressed by several of the delegates at various times throughout the Convention. Madison, for example, on June 7 stated "The use of the Senate is to consist in its proceeding with more coolness, with more system, and with more wisdom, than the popular branch. Enlarge their number and you communicate to them the vices which they are meant to correct."[35] Later, on June 26, when the Senate was under consideration, he said that "In order to judge of the form to be given to this institution, it will be

[35] 1 Records 151.

proper to take a view of the ends to be served by it. These were, first, to protect the people against their rulers; secondly, to protect the people against the transient impressions into which they themselves might be led."[36] On the same day he declared: "One great end of the institution was that, being a firm, wise and impartial body, it might . . . give stability to the general government in its operations on individuals. . . ."[37]

Randolph, on May 31, said that "He observed that the general object was to provide a cure for the evils under which the U. S. labored; that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy; that some check therefore was to be sought for against this tendency of our governments; and that a good Senate seemed most likely to answer the purpose."[38] Again, on June 12, Randolph declared that "The democratic licentiousness of the state legislatures proved the necessity of a firm Senate. The object of this second branch is to control the democratic branch of the national legislature. If it be not a firm body, the other branch being more numerous, and coming immediately from the people, will overwhelm it."[39] Similarly, Gouverneur Morris on July 2, stated that the object of the Senate was "to check the precipitation, changeableness, and excesses of the first branch. Every man of observation had seen in the democratic branches of the state legislatures, precipitation, in Congress changeableness, in every department excesses against personal liberty, private property and personal s a f e t y."[40] And King, on July 14, stated that "The second [branch]was admitted to be necessary, and was actually meant, to check the first branch, to give more wisdom, and stability to the government, and ought clearly as it was to operate on the people to be proportioned to them."[41]

It is not surprising, therefore, that the third resolution of the Virginia Plan was "that the National Legislature ought to consist of two branches." This was agreed to on May 31 without debate or dissent. The New Jersey plan, on the other hand, contemplated the continuation of a unicameral Congress. Consequently, when the resolution was taken up on June 20, there was a brief but revealing debate. Lansing, the state sovereignty advocate, "observed that the true question here was, whether the Convention would adhere to or depart from the foundation of the present confederacy; and moved instead of the 2d resolution 'that the powers of legislation be vested in the United States in Congress.' "[42] Sherman "seconded and supported Mr. Lansing's motion. He admitted

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361 Records 421.
371 Records 427.
381 Records 51.
391 Records 218.
401 Records 512.
412 Records 6.
421 Records 336.

two branches to be necessary in the state legislatures, but saw no necessity for them in a confederacy of states."[43] And Martin "saw no necessity for two branches," inasmuch as "Congress represented the Legislatures."[44] In reply, Mason said that "he believed the mind of the people of America, as elsewhere, was unsettled as to some points, but settled as to others. In two points he was sure it was well settled. 1. in an attachment to republican government.2. in an attachment to more than one branch in the legislature. Their constitutions accord so generally in both these circumstances, that they seem almost to have been preconcerted. This must either have been a miracle, or have resulted from the genius of the people. The only exceptions to the establishment of two branches in the legislatures are the state of Pennsylvania and Congress, and the latter the only single one not chosen by the people themselves. What has been the consequence? The people have been constantly averse to giving that body further powers."[45] Mason was supported by Madison and Wilson who, being advanced nationalists, saw the necessity for a bicameral body. Lansing's motion was defeated, and the second of the resolutions of the Convention submitted to the Committee of Detail on July 26 was that "The Legislature of the United States ought to consist of two branches."

It is clear, therefore, that the adoption of a bicameral Congress was consistent with, and indeed demanded by, the establishment of a "national" government.

**National Methods of Selection.**

The Articles of Confederation had provided, in Article V, that "For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each state shall direct . . . to meet in Congress on the first Monday in November in every year . . . ." This was a completely natural method of choosing delegates in a confederation of sovereign states. The Founding Fathers did not deem it consistent, however, with the establishment of a "national" government, to leave such a matter to the choice of individual states. Instead, they chose to prescribe a uniform method by which members of the bicameral Congress should be chosen in each state. The Constitution provided, therefore, in Article I, Section 2, Clause 1 that "The House of Representatives shall be composed of members chosen every second year by the people of the several states . . . ." And Article I, Section 3, Clause 1 stated that "The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years . . . ."

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43 1 Records 341.
44 1 Records 340.
45 1 Records 339.

The election of representatives by the people was considered by the advanced nationalists as an essential ingredient of their system. Since the laws of the "national" government were to operate directly upon individuals, i.e., the people, it was a corollary principle that the people should elect the members of the national legislature which enacted the laws. Consequently, the fourth of Randolph's original resolutions included a provision that "the members of the first branch of the National Legislature ought to be elected by the people of the several states . . . ." When this resolution was taken up on May 31, a short debate ensued. Sherman "opposed the election by the people, insisting that it ought to be by the state legislatures."[46] Gerry affirmed that "The evils we experience flow from the excess of democracy," and said that he "did not like the election by the people."[47] And Butler also "thought an election by the people an impracticable mode."[48] On the other hand, Mason "argued strongly for an election of the larger branch by the people. It was to be the grand depository of the democratic principle of the government. It was, so to speak, to be our House of Commons. It ought to know and sympathize with every part of the community, and ought therefore to be taken not only from different parts of the whole republic, but also from different districts of the larger members of it."[49] Madison, too, "considered the popular election of one branch of the national legislature as essential to every plan of free government . . . . He thought too that the great fabric to be raised would be more stable if it should rest on the solid foundation of the people themselves, than if it should stand merely on the pillars of the legislatures."[50] And Wilson "contended strenuously for drawing the most numerous branch of the legislature immediately from the people. He was for raising the federal pyramid to a considerable altitude, and for that reason wished to give it as broad a basis as possible . . . . He also thought it wrong to increase the weight of the state legislatures by making them electors of the national legislature. All interference between the general and local governments should be obviated as much as possible. On examination, it would be found that the opposition of states to federal measures had proceeded more from the officers of the states, than from the people at large."[51] The resolution providing for election by the people then carried.

On June 6 the matter was brought up again. On this day Pinckney moved "that the first branch of the national legislature be elected by

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46] Records 48.
47] Records 48.
48] Records 50.
49] Records 48.
50] Records 49-50.
51] Records 49.

the state legislatures, and not by the people."[52] In support of his motion, he said that he "wished to have a good national government and at the same time to leave a considerable share of power in the states . . . . The state legislatures also, he said, would be more jealous and more ready to thwart the national government if excluded from a participation in it."[53] He was supported by Sherman, who asserted that "If it were in view to abolish the state governments, the elections ought to be by the people. If the state governments are to be continued, it is necessary in order to preserve harmony between the national and state governments, that the elections to the former should be made by the latter."[54] Gerry said his "idea was that the people should nominate certain persons in certain districts, out of whom the state legislatures should make the appointment."[55]

The opposition was led by Mason and Madison, supported by Read, Dickinson and Pierce. Mason's point was that since the new government was to operate on individuals, they "ought therefore to choose the representatives."[56] Madison "considered an election of one branch at least of the legislature by the people immediately as a clear principle of free government, and that this mode under proper regulations has the additional advantage of securing better representatives, as well as avoiding too great an agency of the state governments in the general one."[57] Read said bluntly that "Too much attachment is betrayed to the state governments. We must look beyond their continuance. A national government must soon of necessity swallow all of them up."[58] Dickinson "considered it as essential that one branch of the legislature should be drawn immediately from the people, and as expedient that the other should be chosen by the legislatures of the states . . . . He was for a strong national government but for leaving the states a considerable agency in the system."[59] Pierce "was for an election by the people as to the first branch and by the states as to the second branch, by which means the citizens of the states would be represented both individually and collectively."[60] After this debate, Pinckney's motion was defeated, and election by the people retained.

On June 21 Pinckney tried again, moving this time "that the first branch, instead of being elected by the people, should be elected in such manner as the legislature of each state should direct."[61] This, of

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52 1 Records 132.
53 1 Records 132.
54 1 Records 133.
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56 1 Records 133.
57 1 Records 134.
58 1 Records 136.
59 1 Records 136.
60 1 Records 137.
61 1 Records 358.

course, was the system provided by the Articles. The motion was seconded by Martin and supported by Rutledge, who stated that "the delegates to Congress he thought had also been fitter men than would have been appointed by the people at large."[62] Sherman said that he "would like an election by the legislatures best, but is content with the plan as it stands."[63] In opposition, Hamilton said he "considered the motion as intended manifestly to transfer the election from the people to the state legislatures, which would essentially vitiate the plan. It would increase that state influence which could not be too watchfully guarded against. All too must admit the possibility, in case the general government should maintain itself, that the state governments might gradually dwindle into nothing. The system therefore should not be engrafted on what might possibly fail."[64] King, also against the motion, "supposed the legislatures would constantly choose men subservient to their own views as contrasted to the general interest . . . . He remarked several instances in which the views of a state might be at variance with those of the general government."[65] Mason and Wilson also expressed opposition, the Pinckney proposal was defeated, and the matter was settled permanently in favor of popular election of representatives.

On the method of choosing senators, the Virginia plan had provided that "the members of the second branch of the National Legislature ought to be elected by those of the first." When this resolution first came up for discussion on May 31, it was received with general dissatisfaction. Wilson "thought both branches of the National Legislature ought to be chosen by the people,"[66] whereas Spaight "contended that the second branch ought to be chosen by the state legislatures."[67] The upshot was that the resolution was defeated without anything else being substituted in its place. On June 7, Dickinson moved "that the members of the second branch ought to be chosen by the individual legislatures." Sherman seconded, "observing that the particular states would thus become interested in supporting the national government, and that a due harmony between the two governments would be maintained."[68] In support of his motion, Dickinson argued that "The preservation of the states in a certain degree of agency is indispensable. It will produce that collision between the different authorities which should be wished for in order to check each other . . . . He compared the proposed national system to the solar system, in which the states were the planets, and ought to be left to move freely in their proper orbits . . . . If the state

62] Records 359.
63] Records 359.
64] Records 358.
65] Records 359.
66] Records 52.
67] Records 51.
68] Records 150.

governments were excluded from all agency in the national one, and all power drawn from the people at large, the consequence would be that the national government would move in the same direction as the state governments now do, and would run into all the same mischiefs. The reform would only unite the thirteen small streams into one great current pursuing the same course without any oppostion whatever."[69]

Gerry and Pinckney also supported the proposal, but Mason's argument was the decisive one. "Whatever power may be necessary for the national government, a certain portion must necessarily be left in the states. It is impossible for one power to pervade the extreme parts of the United States so as to carry equal justice to them. The state legislatures also ought to have some means of defending themselves against encroachments of the national government. In every other department we have studiously endeavored to provide for its self-defense. Shall we leave the states alone unprovided with the means for this purpose? And what better means can we provide than the giving them some share in, or rather to make them a constituent part of, the national establishment? There is danger on both sides, no doubt; but we have only seen the evils arising on the side of the state governments. Those on the other side remain to be displayed. The example of Congress does not apply. Congress had no power to carry their acts into execution as the national government will have."[70] The matter of affording the states, as states, some method of self-protection within the framework and operation of a national system was, of course, what was behind the divergence over the question of representation in the Congress. Mason's comment here reveals that the two questions—method of selection and basis of representation—were inseparably connected by this common element. And this was recognized, for Butler would take no stand at this time on the method of selection, stating that he "was anxious to know the ratio of representation before he gave any opinion."[71]

Opposing the motion, Wilson affirmed that "If we are to establish a national government, that government ought to flow from the people at large. If one branch of it should be chosen by the legislatures, and the other by the people, the two branches will rest on different foundations, and dissensions will naturally arise between them."[72] He was supported by Morris and Madison. Read advocated the highly centralized method of appointment by the executive from persons nominated by the state legislatures. When the vote was taken, Dickinson's motion carried, and the decision that senators should be elected by the state legislatures was never again seriously challenged.

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[69] 1 Records 152.
[70] 1 Records 155.
[71] 1 Records 151.
[72] 1 Records 151.

Thus it is seen that the system of the Articles of Confederation, in which each sovereign state was free to choose its own manner of selecting delegates to Congress, was consciously abandoned in favor of a system more consistent with a national government, namely, a uniform method prescribed by national law which each state would be required to follow. In the case of members of the House, the system was even more nationistic, i. e., election by the people on whom the national laws were to operate. Not until 1913, when the Seventeenth Amendment substituted popular election of Senators for election by the state legislature, was the United States Congress to rest completely upon the broadest grounds of democratic nationalism. At the same time, it should not be overlooked that the provision for election of Senators by state legislatures served to underscore and emphasize the fact that state sovereignty was to be extinguished by the Constitution. For it was the fact that the states were no longer to be sovereign which made it necessary to give them political representation in the Congress as a means of protecting themselves against the sovereign power of the new national government.

**National Qualifications.**

The Articles of Confederation had imposed no qualifications on the delegates which a state might send to Congress. It was consistent with a system based on state sovereignty that each state should determine for itself what qualifications, if any, should be required of its delegates in Congress. The Founding Fathers, however, did not consider that such a matter should be left for individual state choice in a "national" government, but rather that the Constitution itself should prescribe uniform qualifications for all members of Congress. Consequently, Article I, Section 2, Clause 2 provides that "No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen." And Article I, Section 3, Clause 3 provides that "No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen." These qualifications are remarkably few as compared with those which existed in the states as requisite for election to the legislatures. They are also markedly more liberal and republican than those pertaining to state legislatures in that they make no requirements as to residence, religion or property ownership, all of which were standard in the states.

Since the new "national" government was to be one which operated directly on individuals rather than on states, it is clear that a new relationship was being created, i. e., one between the new "national" gov-

ernment and the individuals on whom it was to operate. As noted, Wilson in the Convention had referred to "the twofold relation in which the people would stand. 1. As citizens of the General Government. 2. As citizens of their particular state."[73] This concept of dual citizenship was incorporated into the Constitution. State citizenship was expressly recognized in Article III, Section 2, which extended the judicial power of the United States to controversies "between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects." And also in Article IV, Section II, which provided that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

In three other provisions the Constitution recognized a United States citizenship. Article I, Section 2, setting the qualifications for members of the House of Representatives, prohibited any person who had not "been seven years a citizen of the United States." Similarly, Section 3 of the same article provided that Senators must have been nine years "a citizen of the United States." Both sections prohibited the offices to persons "who shall not, when elected, be an inhabitant of the State in which he shall be chosen." This language would seem further to demonstrate that a distinction was intended between the two kinds of citizenship, for although a person could be elected to Congress without being a citizen of the state in which elected, it was mandatory that he be a citizen of the United States. The third provision is in Section 1 of Article II. "No person except a natural born citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President." The phrase "citizen of the United States" is not to be found in the Articles of Confederation, although the Articles did refer to the "free inhabitants of each of these states" and also to "free citizens in the several states."

The Constitution, therefore, expressly recognized something which had not been expressly recognized prior to that time, i.e., a citizenship of the United States, which, it seems clear, was from the time of ratification on to be something distinct and different from citizenship of a state. That this was the conscious design of the Founders is demonstrated from the proceedings in the Convention. On July 26 the Convention enacted a resolution "that the Committee of Detail be instructed to receive a clause requiring certain qualifications of landed property and citizenship of the United States in members of the legislature."[74] As the Committee of Detail referred the draft Constitution to the Convention on August 6, the requirement for members of the House of Representatives and Senators

[73] 1 Records 405.
[74] 2 Records 121.

was that they "shall have been a citizen in the United States" for the specified number of years. The Journal of the Convention records that on August 8, the Convention changed the qualification for the House from "a citizen in the United States" to "a citizen of the United States,"[75] and on August 9 made the same alteration as to the qualification for Senators.[76] The records contain no discussion of these amendments, but the importance of the change is apparent. The phrase "citizen in the United States" arguably might mean no more than citizenship in one of the states in the United States. The phrase "citizen of the United States," however, demands a different meaning, especially so when contrasted with the express recognition of state citizenship in other sections.

Now while the Constitution uses the term "citizen" and recognizes a distinction between state citizenship and United States citizenship, it does not contain any definition of the term "citizen" nor does it contain any rules defining who were to be "citizens." Hisorical research has revealed that Americans of that day used the term "citizen" as synonymous with "subject," the one term being more appropriate for a republic, the other for a monarchy. Under the common law at that time, "subjects" of the King were all persons of British nationality. Under contemporary usage, therefore, it seems clear that to the Founding Fathers "citizenship" and "nationality" meant one and the same thing, that is, one who belonged to a particular state. The phrase "citizen of the United States," therefore, necessarily contemplated a national political entity. And this, of course, is completely consistent with the repeated references throughout the Convention to a "national" government.

The debate on the requirement of inhabitance in the state was short but illuminating. As reported to the Convention by the Committee of Detail, the section required that the representative be, at the time of election, a "resident" of the state from which chosen. It was moved that "resident" be struck out and "inhabitant" inserted, since great disputes had arisen in the states over the term "residence," whereas "inhabitant" apparently had a more settled meaning. Madison said that "both were vague, but the latter least so in common acceptation, and would not exclude persons absent occasionally for a considerable time on public or private business."[77] Rutledge opposed the motion and held out for "residence" as a qualification for representatives. Read thereupon "reminded him that we were not forming a national government and such a regulation would correspond little with the idea that we were one people."[78] And Mercer declared that "Such a regulation would present a greater alienship among the states than existed under the old federal

752 Records 213.
762 Records 228.
772 Records 217.
782 Records 217.

system. It would interweave local prejudices and state distinctions in the very Constitution which is meant to cure them.[79] On the vote, "inhabitant" was inserted in place of "resident." The same action was taken with regard to parallel language in the qualifications for Senator.

Thus the fact that qualifications were prescribed in the Constitution itself, plus the considerations prompting the usage of the terms "citizen of the United States" and "inhabitant," again reveals the conscious movement from a federal system of sovereign states toward a national government.

**National Compensation.**

The Articles of Confederation had provided, in Article V, that "Each state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of the states." In a confederation of sovereign states, with a Congress in which each delegate was merely an agent of his state, it was fitting and proper that the compensation of each delegate should be paid by the state which he represented. The Founding Fathers, however, did not deem such a method of compensation suitable for the members of a "national" legislature. The Constitution, therefore, provides in Article I, Section 6, Clause 1, that "The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States." Thus it provided that members of Congress were to be paid by the "national" government of which they were officers. This provision, however, was not won without a struggle, and the debates in the Convention reveal clearly how the drive for a truly national government had to overcome considerations based on deep-seated state attachments.

Randolph's original resolutions of May 29 had provided that members of the national legislature should "receive liberal stipends by which they may be compensated for the devotion of their time to public service,"[80] but had contained no reference to the source from which such payments should be made. When this provision first came up for debate on June 12, Madison moved that the compensation be "fixed" and observed "that it would be improper to leave the members of the national legislature to be provided for by the state legislatures because it would create an improper dependence."[81] Mason seconded, adding that "it would be improper, for other reasons, to leave the wages to be regulated by the states—first, the different states would make different provisions for their representatives, and an inequality would be left among them, whereas he thought they ought to be in all respects equal."[82] Pierce then

792 Records 217.
801 Records 20.
811 Records 215.
821 Records 216.

moved that "the wages should be paid out of the national treasury,"[83] which passed without debate. Butler and Rutledge then proposed that the members of the second branch be entitled to no salary or compensation for their services."[84] Madison included a footnote at this point that "It is probable that the votes here turned chiefly on the idea that if the salaries were not here provided for, the members would be paid by their respective states."[85] This proposal was defeated, and it was then agreed that the clause should be the same for both houses. Accordingly, the committee of the whole reported to the Convention on June 19 resolutions that members of the two branches should "receive fixed stipends by which they may be compensated for the devotion of their time to the public service to be paid out of the national treasury."[86]

When the resolution relating to the first branch came up for consideration on June 22, Ellsworth promptly "moved to substitute payment by the state, out of their own treasuries."[87] Williamson "favored the idea,"[88] and Sherman "contended for referring both the quantum and the payment of it to the state legislatures."[89] The reaction of the nationalists was vigorous. Randolph said he "feared we were going too far in consulting popular prejudices. . . . If the states were to pay the members of the national legislature, a dependence would be created that would vitiate the whole system. The whole nation has an interest in the attendance and services of the members. The national treasury therefore is the proper fund for supporting them."[90] King "Urged the danger of creating a dependence on the states by leaving to them the payment of the members of the national legislature."[91] Wilson said that he "thought it of great moment that the members of the national government should be left as independent as possible of the state governments in all respects."[92] Madison "concurred in the necessity of preserving the compensations for the national government independent of the state governments."[93] And Hamilton said he "was strenuous against making the national council dependent on the legislative rewards of the states. Those who pay are the masters of those who are paid. . . . He expatiated emphatically on the differences between the feelings and views of the *people* and the *governments* of the states, arising from the personal interest and official inducements which must render the

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[83] Records 216.
[84] Records 219.
[85] Records 219.
[86] Records 229.
[87] Records 371.
[88] Records 372.
[89] Records 373.
[90] Records 372.
[91] Records 372.
[92] Records 373.
[93] Records 373.

latter unfriendly to the general government. . . . He pressed the distinction between the state governments and the people. The former would be the rivals of the general government. The state legislature ought not, therefore, to be the paymasters of the latter."[94] Against this barrage, Ellsworth protested that "If we are jealous of the state governments, they will be so of us."[95]

The vote was close—four states supported the Ellsworth motion, five were opposed, and two were divided. At this point Madison added another footnote: "It appeared that Massachusetts concurred, not because they thought the state treasury ought to be substituted but because they thought nothing should be said on the subject, in which case it would silently devolve on the national treasury to support the national legislature."[96] It was then agreed without debate that "adequate compensation should be substituted in place of "fixed stipends." However, when Butler moved "that a question be taken on both points jointly, to wit, 'adequate compensation to be paid out of the national treasury,' "[97] the vote was five states for, five against, and one divided. "So the question was lost, and the sentence was not inserted."[98]

When the matter came up again on June 26 with respect to the compensation of Senators, Ellsworth made another try, this time moving to strike out "to be paid out of the national treasury" and to insert "to be paid by their respective states." He argued that "If the Senate was meant to strengthen the government, it ought to have the confidence of the states."[99] In reply, Madison said that he "considered this as a departure from a fundamental principle. . . . They would, if this motion should be agreed to, hold their places during the pleasure of the state legislatures. . . . The motion would make the Senate, like Congress, the mere agents and advocates of state interests and views, instead of being the impartial umpires and guardians of justice and the general good."[100] And Dayton said that he "considered the payment of the Senate by the states as fatal to their independence. He was decided for paying them out of the national treasury."[101] Again the vote was close—five states in support of Ellsworth's motion, and six against. Immediately thereafter, however, a question was taken whether the words "to be paid out of the public treasury" should stand, and this was also defeated by a five to six division, North Carolina inexplicably voting against both modes of payment.

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941 Records 373.
951 Records 374.
961 Records 374.
971 Records 374.
981 Records 385.
991 Records 427.
1001 Records 427-8.
1011 Records 428.

The sources differ as to the resolution referred to the Committee of Detail. One version is that the Convention resolved that "members of the first branch ought . . . to be paid out of the public treasury. . . ."[102] Another is that no reference was made to compensation for representatives.[103] The resolution as to Senators was that they should "receive a compensation" without reference to its source. It is clear, however, that the Convention had twice specifically rejected, as proposed by Ellsworth, the method of payment by the states. Notwithstanding this fact, when the Committee of Detail reported back a draft constitution to the Convention, it provided that "The members of each house shall receive a compensation for their services, to be ascertained and paid by the state in which they shall be chosen."[104] This was the system of the Articles all over again, and of course was inconsistent with the whole idea of a national legislature as part of a national government. It must have come as quite a surprise to many members of the Convention that this method of payment should have been included by the Committee of Detail after having twice been expressly rejected by the Convention.

But an even greater surprise was yet to come. For when this provision came up for consideration on August 6, it was Ellsworth, who had twice sought its inclusion by the Convention and who had been a member of the Committee of Detail, who now spoke in opposition to the proposal. He said that "in reflecting on this subject, he had been satisfied that too much dependence on the states would be produced by this mode of payment."[105] He therefore moved to strike it out and insert "that they should be paid out of the treasury of the United States."[106] He was supported by Morris, Langdon and Madison. But Butler "Contended for payment by the states, particularly in the case of the Senate, who will be so long out of their respective states that they will lose sight of their constituents unless dependent on them for their support."[107] In reply, Gerry said that "The observation of Mr. Butler had weight in it. On the other side, the state legislatures may turn out the senators by reducing their salaries."[108] Mason added: "It has not yet been noticed that the clause as it now stands makes the House of Representatives also dependent on the state legislatures; so that both houses will be made the instruments of the politics of the states, whatever they may be."[109]

Broom, in one of his rare utterances, said that he "could see no danger in trusting the general legislature with the payment of themselves."[110]

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102PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 416 (1941).
1032 Records 129.
1041 Records 180.
1052 Records 290.
1062 Records 290.
1072 Records 290.
1082 Records 291.
1092 Records 291.
1102 Records 291.

Carroll and Dickinson both spoke out strongly. Carroll said he "had been much surprised at seeing this clause in the report. The dependence of both houses on the state legislatures is complete, especially as the members of the former are eligible to state offices. The states can now say: If you do not comply with our wishes, we will starve you; if you do, we will reward you. The new government in this form was nothing more than a second edition of Congress in two volumes instead of one."[111] And Dickinson said that he "took it for granted that all were convinced of the necessity of making the general government independent of the prejudices, passions, and improper views of the state legislatures. The contrary of this was effected by the section as it stands. . . . If the general government should be left dependent on the state legislatures it would be happy for us if had never met in this room."[112]

Luther Martin, the state sovereignty diehard, said that "As the Senate is to represent the states, the members of it ought to be paid by the states."[113] To which Carroll replied that "The Senate was to represent and manage the affairs of the whole and not to be the advocates of state interests. They ought then not to be dependent on nor paid by the states."[114] The Convention then voted, nine states to two, to pay members of the national legislature out of the national treasury. And so on this question, so vital to the creation of a national government, which in the most practical way required a clear choice between national supremacy and state sovereignty, the Convention's original decision of May 29 in favor of national payment was in the end adhered to by an overwhelming vote, in the face of persistent and determined efforts to change it.

**National Prerogatives.**

1. *Census and allotment of representatives.* The Articles of Confederation had provided that "No state shall be represented in Congress by less than two, nor by more than seven members." The Constitution, in replacing a unicameral with a bicameral Congress, dealt with the number of members in a different manner. As to the Senate, there were to be two Senators from each state. As to the House, Article I, Section 2, Clause 3 provided that "Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons. The actual enumeration shall be made within three

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[111] 2 Records 292.
[112] 2 Records 292.
[113] 2 Records 292.
[114] 2 Records 292.

years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct." There followed a listing of the number of representatives each state should have until the enumeration was made.

This section was the result of a motion made by Randolph on July 10 that "in order to ascertain the alterations in the population and wealth of the several states the Legislature should be required to cause a census, and estimate to be taken within one year after its first meeting; and every years thereafter, and that the Legislature arrange the representation accordingly."[115] There was some debate as to whether the matter should be dealt with in the Constitution or left to the discretion of Congress. Morris "opposed it as fettering the Legislature too much."[116] Read also "thought the Legislature ought not to be too much shackled."[117] Wilson "had himself no objection to leaving the legislature entirely at liberty."[118] On the other hand, Mason said that "The greater the difficulty we find in fixing a proper rule of representation, the more unwilling ought we to be to throw the task from ourselves on the general legislature."[119] Sherman said "he was at first for leaving the matter wholly to the discretion of the legislature; but he had been convinced by the observations of Mr. Randolph and Mr. Mason that the periods and the rule of revising the representation ought to be fixed by the Constitution."[120] Gorham's view was that "If the Convention who are comparatively so little biased by local views are so much perplexed, how can it be expected that the legislature hereafter under the full bias of those views, will be able to settle a standard. He was convinced by the arguments of others and his own reflections, that the Convention ought to fix some standard or other."[121] No one, however, disagreed with Randolph when, on July 11, speaking in behalf of a substitute offered by Williamson, he stated that "the census must be taken under the direction of the general legislature. The states will be too much interested to take an impartial one for themselves."[122]

So it was that the Constitution provided that there should be a national allotment of representatives based on the national population as determined by a census taken in accordance with national law. All of which, of course, was consistent with the idea of a national legislature.

2. *Tenure.* The Articles of Confederation provided in Article V that "delegates should be annually appointed in such manner as the legislature of each state shall direct... with a power reserved to each

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115] Records 570-1.
116] Records 571.
117] Records 582.
118] Records 583.
119] Records 578.
120] Records 582.
121] Records 583.
122] Records 580.

state, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year." The same Article also stated that "no person shall be capable of being a delegate for more than three years in any term of six years." The power of the state to recall and the limitation on consecutive service both served to minimize the likelihood that any state delegate should become too attached to national or general interests. Together with the provision already noted that delegates were to be financially maintained by the states, these clauses assured a complete dominion of the state over the delegate and effectively precluded his becoming anything more than an agent of state interests. These provisions, completely natural and normal in a confederation of sovereign states, were completely inconsistent with a national legislature. Accordingly, it is not surprising that both provisions were eliminated in the Constitution. Curiously enough, both were found in the original Randolph resolutions, but both were struck out, on motion of Pinckney on June 12, without any debate and without a dissenting vote. Consequently, as befits members of a national legislature, Representatives and Senators enjoy fixed terms immune from state recall, with no limitation on re-eligibility for office.

3. *Contested elections.* Under the Articles of Confederation, the Congress had no control whatever over the selection of the delegates from the states. As we have seen previously, on June 21 Pinckney sought to replace the popular election of representatives, as provided for in the Virginia plan, with the system which had prevailed under the Articles; namely, election "in such a manner as the legislature of each state shall direct." One of the arguments offered by Pinckney in support of his motion was "that otherwise disputed elections must be referred to the general legislature which would be attended with intolerable expense and trouble to the distant parts of the republic."[123] On the other hand, Wilson and Madison opposed the motion for the very reason, among others, that "the returns may be made to the legislatures of the several states—they may judge of contested elections."[124] Pinckney's motion was defeated, but no further action was taken by the Convention at the time with respect to judging contested elections. The Committee of Detail, however, included a provision in its draft that each house should be the judge of the elections, returns and qualifications of its own members. On August 10 this provision was agreed to without debate and without dissent. On September 14 a motion to reconsider was defeated without debate. Consequently, the Constitution provides, in Article I, Section 5, Clause 1, that "Each house shall be the judge of the elections, returns, and qualifications of its own members." The states were thus completely precluded from any participation in disputes over the elec-

[123] 1 Records 358.
[124] 1 Records 367.

tion or qualifications of members of Congress. These were matters to be determined by the national legislature itself.

4. *Quorum and attendance.* The Articles of Confederation, as noted, had provided that no state should be represented by less than two members. Furthermore, Article IX prohibited Congress from exercising its most important powers " unless nine states assent to the same," and from taking any action at all (except adjourning from day to day) "unless by the votes of a majority of the united states in congress assembled." The paralysis which resulted from the requirement of a quorum of states and the declining attendance in Congress after the war has already been discussed in a previous article. This was in keeping, of course, with a confederation of sovereign states. A national legislature, however, could not exercise national powers effectively under any such legislative arrangement. Consequently, the Constitution radically transformed this system by providing, in Article I, Section 5, Clause 1, that "a majority of each [house] shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide."

This section originated with the Committee of Detail, which had included in its draft a provision that a majority in each house should constitute a quorum to do business. When this came up for consideration on August 10, Gorham "contended that less than a majority in each house should be made of quorum, otherwise great delay might happen in business, and great inconvenience from the future increase of numbers."[125] Mercer "was also for less than a majority. So great a number will put it in the power of a few by seceding at a critical moment to introduce convulsions, and endanger the government.... He was for leaving it to the legislature to fix the quorum."[126] Mason argued, however, that "This is a valuable and necessary part of the plan. In this extended country, embracing so great a diversity of interests, it would be dangerous to the distant parts to allow a small number of members of the two houses to make laws.... He thought the Constitution as now moulded was founded on sound principles, and was disposed to put into it extensive power. At the same time he wished to guard against abuses as much as possible."[127] Morris observed that "the secession of a small number ought not to be suffered to break a quorum. Such events in the states may have been of little consequence. In the national councils, they may be fatal."[128] Ellsworth said that "It would be a pleasing ground of confidence to the people that no law or burden could be imposed on

125 2 Records 251.
126 2 Records 251.
127 2 Records 251-2.
128 2 Records 252.

them by a few men."[129] He suggested, therefore, that "The inconveniency of secessions may be guarded against by giving to each house an authority to require the attendance of absent members."[130] Randolph and Madison moved to add to the provision as it stood "and may be authorized to compel the attendance of absent members in such a manner and under such penalties as each house may provide."[131] This was agreed to and the section as amended was then adopted without further debate. It is significant that at no time did any one suggest that a quorum should be in any way related to the number of states represented, not even in the Senate, where each state had an equality of representation. Both of these actions of the Convention—making a numerical majority a quorum and empowering Congress to compel attendance—constituted a clear repudiation of the state sovereignty which had prevailed under the Articles with respect to these matters.

5. *Discipline of membership.* The Articles of Confederation granted Congress no authority over individual delegates. The Thomas Burke incident recounted in a previous article demonstrated that Congress was powerless to discipline a member, even one who had deliberately destroyed a quorum by refusing to attend. For their conduct in Congress, delegates were amenable only to the states which they represented. This was consistent with a compact of sovereign states, but not with a national legislature. Consequently, the Constitution provided, in Article I, Section 5, Clause 2 that "Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member." This section was inserted originally by the Committee of Detail. When it came up for consideration on August 10, Madison "observed that the right of expulsion was too important to be exercised by a bare majority of a quorum, and in emergencies of faction might be dangerously abused. He moved that 'with the concurrence of 2/3' might be inserted between 'may' and 'expel.' "[132] Although Morris thought that "This power may be safely trusted to a majority,"[133] the amendment carried and as amended the section passed without debate and without dissent. In the future, no member would humiliate the new national legislature as Thomas Burke had humiliated the old Congress. Again state sovereignty had been abandoned in favor of national supremacy.

6. *Impeachment.* The foregoing provisions indicate the extent to which the states were stripped of all formal control over members of Congress. They were also denied participation in the process whereby members of the executive and judicial branches of the national govern-

129 2 Records 253.
130 2 Records 253.
131 2 Records 253-4.
132 2 Records 254.
133 2 Records 254.

ment could be impeached. An attempt was made, however, to include state participation in the removal of the President. On June 2, Dickinson moved "that the executive be made removable by the national legislature on the request of a majority of the legislatures of individual states."[134] In support of his motion, he said that "It was necessary . . . to place the power of removing somewhere. He did not like the plan of impeaching the great officers of state. He did not know how provision could be made for removal of them in a better mode than that which he had proposed. He had no idea of abolishing the state governments as some gentlemen seemed inclined to do. The happiness of this country in his opinion required considerable powers to be left in the hands of the states."[135] Madison and Wilson promptly objected on the ground that such a plan "would open a door for intrigues against him [the president] in states where his administration though just might be unpopular, and might tempt him to pay court to particular states whose leading partisans he might fear, or wish to engage as his partisans. They both thought it bad policy to introduce such a mixture of state authorities, when their agency could be otherwise supplied."[136] The motion was defeated, all states except Delaware, Dickinson's own state, being opposed. With respect to the removal of judges, an interesting incident occurred later in the Convention. Dickinson sought on August 27 to provide for their removal by the President on application of Congress. Rutledge opposed the motion on the ground that "If the supreme court is to judge between the United States and particular states, this alone is an insuperable objection to the motion."[137]

In the end, the method of removal decided on by the Convention was the one most consistent with a national government. Article II, Section 4 provided: "The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." And Article I, Section 2, Clause 5 provided that "the House of Representatives . . . shall have the sole power of impeachment." Thus, high officers of the national government were subject to impeachment by the branch of the national legislature representing the people on whom that government was to be directly operative.

The sum total of what has been said regarding the national legislature in various respects—its bicameral structure, its nationally prescribed methods of selection, its nationally prescribed qualifications, its national compensation, and its national prerogatives of allotment, tenure, judging contested elections and qualifications, quorum and compulsory attendance, discipline, and impeachment—reveals clearly the complete

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134 1 Records 85.
135 1 Records 85.
136 1 Records 86.
137 2 Records 428.

antithesis between the nature of the Congress of the Articles of Confederation and that of the Congress created by the Constitution. Under the Articles, every provision and practice was what it was because the Congress was merely a convention of agents representing sovereign states. With the abolition of state sovereignty and its replacement by a national government operating directly upon the people, it was necessary that the national legislature should be freed from dependence on and control by the states. The foregoing discussion amply demonstrates the completeness with which this was accomplished.

In only three respects were the states accorded any recognition or participation in the selection or composition of the national legislature.

1. *State equality of representation in the Senate.* This topic will be dealt with subsequently in connection with the discussion of the powers of the national legislature. At that time further consideration will be given to the significance of the selection of Senators by the state legislatures.

2. *State determination of suffrage requirements.* The Constitution, in Article I, Section 2, Clause 1, after providing for popular election of representatives, then states that "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." This provision originated with the Committee of Detail, and the records indicate that the Committee originally contemplated nationally prescribed standards. One committee draft was that the qualifications of electors should be the same as in the states "unless the legislature (i.e., Congress) shall hereafter direct some uniform qualification to prevail through the states."[138] Another committee draft would have limited the suffrage to freeholders of fifty acres, at least twenty-one years old, and with one year's residence in the United States.[139] The temptation to prescribe qualifications nationally undoubtedly arose from the wide diversity of suffrage requirements in the states, where there was a wide variance in such factors as residence, property ownership, payment of taxes, etc. In no two states, as a matter of fact, were the requirements exactly the same. On the other hand, this very diversity rendered it almost impossible to devise a national scheme which would meet with general satisfaction.

When the matter came before the convention on August 7, Morris moved to strike out the committee recommendation "in order that some other provision might be substituted which would restrain the right of suffrage to freeholders."[140] According to King, however, the motion was "to leave it to the Legislature (i.e., Congress) to establish the qualifications of electors and elected, or to add a clause that the Legislature may

138 2 Records 139.
139 2 Records 151.
140 2 Records 201.

hereafter alter the qualifications."[141] Morris was not only opposed to voting by non-freeholders; he also thought that "Another objection against the clause as it stands is that it makes the qualifications of the national legislature depend on the will of the states, which he thought not proper."[142] Madison favored a limitation to freeholders, but thought that "the right of suffrage is certainly one of the fundamental articles of republican government, and ought not to be left to be regulated by the legislature."[143] Wilson took the view that "This part of the report was well considered by the committee, and did not think it could be changed for the better. It was difficult to form any uniform rule of qualifications for all the states."[144] Mason believed that "A power to alter the qualifications would be a dangerous power in the hands of the legislature."[145] And Ellsworth "thought the qualifications of the electors stood on the most proper footing. The right of suffrage was a tender point, and strongly guarded by most of the state constitutions. The people will not readily subscribe to the national constitution if it should subject them to be disfranchised. The states are the best judge of the circumstances and temper of their own people."[146] Morris's motion was then defeated, and the matter was never thereafter raised again. Inasmuch as the suffrage requirements in the states were constitutionally prescribed, the method provided by the Constitution represents a compromise between Congressional or state legislative control. It is clear, therefore, that this constitutional provision does not represent a concession to state sovereignty.

3. *State determination of electoral processes.* The draft submitted to the Convention by the Committee of Detail contained a provision that "The times and places and the manner of holding the elections of the members of each House shall be prescribed by the legislatures of each state; but their provisions concerning them may, at any time, be altered by the Legislature of the United States."[147] When the matter came up for discussion on August 9, the first part was agreed to without debate and without dissent. The second part, recognizing a controlling authority in Congress, occasioned some debate. Pinckney and Rutledge moved to strike this second part. "The states, they contended, could and must be relied on in such cases."[148]

The nationalist opposition to this motion was vigorous. Gorham said that "It would be as improper to take this power from the national

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141 2 Records 200-7.
142 2 Records 201.
143 2 Records 203.
144 2 Records 201.
145 2 Records 202.
146 2 Records 201.
147 2 Records 179.
148 2 Records 240.

legislature, as to restrain the British Parliament from regulating the circumstances of elections, leaving this business to the counties themselves."[149] Madison argued that "The necessity of a general government presupposes that the state legislatures will sometimes fail or refuse to consult the common interest at the expense of their local convenience or prejudices. . .the legislatures of the states ought not to have the uncontrolled right of regulating the time, places, and manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. . . . Whenever the state legislatures had a favorite measure to carry, they would take care so as to mould their regulations as to favor the candidates they wished to succeed . . . .It seemed as improper in principle, though it might be less inconvenient in practice, to give to the state legislatures this great authority over the election of the representatives of the people in the general legislature as it would be to give to the latter a like power over the election of their representatives in the state legislatures."[150] King asserted that "If this power be not given to the national legislature, their right of judging of the returns of their members may be frustrated. No probability has been suggested of its being abused by them. Although this scheme of erecting the general government on the authority of the state legislatures has been fatal to the federal establishment, it would seem as if many gentlemen still foster the dangerous idea."[151] And Morris "observed that the states might make false returns and then make no provisions for new elections."[152] Even Sherman "did not know but it might be best to retain the clause, though he had himself sufficient confidence in the state legislatures."[153] The motion of Pinckney and Rutledge was then defeated.

Immediately thereafter, "On the motion of Mr. Read, the word 'their' was struck out and 'regulations in such cases' inserted in place of 'provisions concerning them,' the clause then reading 'but regulations, in each of the foregoing cases, may at any time be made or altered by the legislature of the United States.'"[154] The explanation given for this motion was that "This was meant to give the National Legislature a power not only to alter the provisions of the states, but to make regulations in case the states should fail or refuse altogether."[155] The result of the debate, therefore, was that the ultimate and controlling power of Congress was confirmed and even expanded. On September 14 one further change was made. The words "except as to the places of choosing

149 2 Records 240.
150 2 Records 240-1.
151 2 Records 241.
152 2 Records 241.
153 2 Records 241.
154 2 Records 242.
155 2 Records 242.

Senators" were added at the end of the clause.[156] This amendment resulted from the feeling that the state legislatures, who were to choose the Senators, should be free to control their own place of meeting.

The final form, in Article I, Section 4, Clause 1, reads as follows: "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators." It is clear that this clause, although recognizing initial state power to control the electoral process, was not included because of any solicitude for state sovereignty. On the contrary, the insistence that ultimate power rests with Congress is an express assertion of national supremacy.

## NATIONAL LEGISLATIVE POWERS

The insufficiency of the powers of Congress under the Articles of Confederation was by 1787 recognized and admitted by everyone. Increased central powers had been a nationalist article of faith since before the adoption of the Articles. Consequently, it is not surprising that the Virginia plan should deal with this matter in the sweeping fashion that it did. The sixth resolution introduced by Randolph provided that "the National Legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation and moreover to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."

When the Convention, acting as a committee of the whole, considered this resolution on May 31, a short discussion ensued. Pinckney and Rutledge "objected to the vagueness of the term incompetent, and said they could not well decide how to vote until they should see an exact enumeration of the powers comprehended by this definition."[157] Butler "repeated his fears that we were running into an extreme in taking away the powers of the states, and called on Mr. Randolph for the extent of his meaning."[158] Whereupon Randolph "disclaimed any intention to give indefinite powers to the national legislature, declaring that he was entirely opposed to such an inroad on the state jurisdictions."[159] Madison's comment was most discreet. He said "that he had brought with him into the Convention a strong bias in favor of an enumeration and definition of the powers necessary to be exercised by the national legislature; but had also brought doubts concerning its practicability. His wishes remained unaltered; but his doubts had become stronger. What his opinion

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1562 Records 613.
1571 Records 53.
1581 Records 53.
1591 Records 53.

might ultimately be he could not yet tell. But he should shrink from nothing which should be found essential to such a form of government as would provide for the safety, liberty and happiness of the community. This being the end of all our deliberations, all the necessary means for attaining it must, however reluctantly, be submitted to."[160] Then, on the question of giving powers in cases to which the states were not competent, the committee expressed its approval, nine states to none, with one state divided. The other two clauses of the resolution were approved without debate or dissent. The committee of the whole thus approved the resolution as first proposed by Randolph.

The resolution came before the Convention as such on July 16, and the first clause was approved without debate or dissent. The second and third clauses, however, granting power to legislate in cases to which the states were incompetent or in which individual legislation would interrupt the harmony of the the United States, occasioned some debate. Butler called for "some explanation of the extent of this power; particularly of the word incompetent. The vagueness of the terms rendered it impossible for any precise judgment to be formed."[161] To which Gorham replied that "The vagueness of the terms constitutes the propriety of them. We are now establishing general principles, to be extended hereafter into details which will be precise and explicit."[162] Rutledge then "urged the objection started by Mr. Butler and moved that the clause should be committed to the end that a specification of the powers comprised in the general terms might be reported."[163] On this question the states were equally divided, five to five, and the motion was lost.

The next day, July 17, Sherman "observed that it would be difficult to draw the line between the powers of the general legislatures, and those to be left with the states; that he did not like the definition contained in the resolution."[164] Accordingly, in place of the two clauses under discussion, he proposed to substitute the following: "to make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the government of the individual states in any matters of internal police which respect the government of such states only, and wherein the general welfare of the United States is not concerned." Morris opposed the motion, "The internal police, as it would be called and understood by the states, ought to be infringed in many cases, as in the case of paper money and other tricks by which citizens of other states may be affected."[165] On the question, Sherman's vote was decisively defeated, eight to two.

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[160] 1 Records 53.
[161] 2 Records 17.
[162] 2 Records 17.
[163] 2 Records 17.
[164] 2 Records 25.
[165] 2 Records 26.

Bedford then moved that the resolution be altered so as to include the clause "and moreover to legislate in all cases for the general interests of the Union." The addition of this power expanded the legislative power of Congress even beyond the broad coverage of the Virginia resolution. So much so that even Randolph was taken aback, and moved to state that "This is a formidable idea indeed. It involves the power of violating all the laws and constitutions of the states, and of intermeddling with their police."[166] In other words, it accomplished the very thing he had earlier disclaimed would be accomplished by his own resolution. Bedford responded that "it is not more extensive or formidable than the clause as it stands; no state being separately competent to legislate for the general interest of the union."[167] On the vote, Bedford's motion carried, six to four, and the entire clause as amended was then approved, eight to two.

Up to this point, then, the Convention had approved a general broad legislative power in Congress, had rejected a proposal to specifically enumerate the powers of Congress, had rejected a proposal to protect the internal police power of the states against the power of Congress, and finally had amended the legislative power to make it even more sweeping and comprehensive than it had originally been. The resolution submitted by the Convention to the Committee of Detail was that "the Legislature of the United States ought to possess the legislative rights vested in Congress by the Confederation; and moreover to legislate in all cases for the general interests of the Union, and also in those cases to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." The draft constitution reported to the Convention by the Committee of Detail revealed a substantial change in form and language. For the broad general grant there was substituted an enumeration of particular powers. This policy of enumeration was not departed from by the Convention, with the result that Article I, Section 8 of the Constitution lists eighteen separate powers of Congress, and other powers are set forth in other sections. The significance of enumeration of legislative powers rather than general grant will be commented on subsequently. First, however, the powers themselves will be considered in light of their relationship to the question of state sovereignty.

**Fiscal Powers.**

The fiscal powers granted to Congress by the Articles of Confederation were two. Congress was vested with the power of "regulating the alloy and value of coin struck by their own authority, or by that of the respective states." This power was carried forward, modified and amplified under the Constitution, which authorized Congress "To coin money,

166 2 Records 26.
167 2 Records 27.

regulate the value thereof, and of foreign coin. . . ." The reference to the coin of the states was deleted inasmuch as the states were specifically prohibited, in Article I, Section X, from coining money. The power to regulate value of foreign as well as domestic coin was one which had not existed in Congress under the Articles. Being a power incident to sovereignty, it affords one illustration of the conscious shift of sovereignty from states to nation. The Articles had also granted to Congress the power "to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective states an account of the sums of money so borrowed or emitted." This power was also carried over into the Constitution, naturally omitting any necessity of accounting to the states and also deleting the express power of emitting bills of credit.

As has been noted, it was the absence of any power of taxation in Congress which was one of the most glaring inadequacies of the Articles of Confederation. The Articles had merely provided that "All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state. . . . The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislature of the several states. . . ." Under this system, it is seen that Congress had no power to obtain any revenue by laying taxes directly upon individual citizens. Congress could only make requisitions upon the states, but Congress lacked any power to compel the states to comply with such requisitions. Such a system was consistent, of course, with a compact of sovereign states. The almost fatal consequences of state sovereignty in this area before and after the revolution and the repeated refusal of the states to grant any additional power to Congress have been chronicled in a previous article. The necessity of a national power of taxation was accepted by almost everyone by 1787. Even the New Jersey plan, clinging as it did to a federal system, would have authorized Congress "to pass acts for raising a revenue" and "to make rules and regulations for the collection thereof." And it is probably not a coincidence that, when the Committee of Detail decided to enumerate the powers of Congress, the very first one vested a "power to lay and collect taxes, duties, imposts and excises." When this language came up for consideration on August 16, there was not a dissenting voice raised against the grant of power. The only discussion which occurred related to the question of whether the power should extend to exports. On the vote, only Gerry voted against the grant of power.

It may safely be said that no other section in the Constitution more conclusively demonstrates the transition from a confederation of sove-

reign states to a national government operating directly upon individuals than does the first clause of Article I, Section 8: "The Congress shall have the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States." This broad and sweeping power was qualified in only three ways, none of very great importance from the standpoint of ability to raise revenue. The granting clause itself contains one limitation, that "all duties, imposts and excises shall be uniform throughout the United States." A second limitation is found in both Article I, Section 3 and Article I, Section 9, which contain a requirement that direct taxes be apportioned among the states in accordance with their population as determined by the national census. The third limitation, found also in Article I, Section 9, prohibits a tax on articles exported from any state. It seems clear that these limitations were placed upon the national power for the protection of individuals upon whom the power was to operate, and not because of any consideration of state sovereignty. This is readily apparent as to the uniformity and apportionment requirements; that it is also true of the export limitation is plain, since the Constitution in Article I, Section 10, placed the same restriction upon the states.

**Commercial Powers.**

The powers of Congress under the Articles of Confederation relating to trade and commerce were very limited. Virtually this entire domain was subject to the sovereign will of the several states. The Articles did grant to Congress the power of "fixing the standard of weights and measures throughout the United States," and this power was carried forward into the Constitution. Congress also had under the Articles, the power of "establishing and regulating post-offices from one state to another, throughout all the united states, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office." This power was also carried forward into the Constitution in simplified form, Article I, Section 8 granting the power in clause seven "To establish post offices and post roads." The third and final power of Congress in this area was of "regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated." Not only was this power over trade confined to Indians, but the proviso effectively nullified the grant and left the authority of the states supreme.

It was in the realm of commercial intercourse among the states themselves and with foreign nations that the Articles of Confederation were inadequate, for in these vital areas Congress had no power whatsoever. The disastrous consequences resulting from the absence of na-

tional power and the unsuccessful efforts to amend the Articles were summarized in a previous article. It has been pointed out that commercial reform was the stated reason for the convening of the Annapolis Convention, which led to the calling of the Philadelphia Convention. In the light of this background, it is not surprising that the draft reported to the Convention by the Committee of Detail contained the broad and unqualified grant of power to Congress "to regulate commerce with foreign nations and among the several states." Nor is it surprising that when this clause came up for consideration on August 16, it was approved by the Convention without discussion and without dissent. So easily and readily was a huge and vitally important area of legislative power transferred from the states to the nation. On motion of Brearley, the Convention added the words "and with the Indian tribes," thus removing this then-important area from the jurisdiction of the states.

The draft submitted by the Committee of Detail had contained a provision requiring a two-thirds majority in each house for the passage of navigation acts. On referral to a committee, it was recommended that this provision should be stricken. When this committee report came up on August 29, the younger Pinckney moved to postpone it in order to take up the following proposition: "That no act of the Legislature for the purpose of regulating the commerce of the United States with foreign powers, or among the several states, shall be passed without the assent of two thirds of the members of each House." This proposal went further even than the Committee draft, since it would have required an extraordinary majority for any regulation of commerce and not merely for navigation acts. Since the states were to be equally represented in the Senate, the adoption of the Pinckney proposition would have represented an approval and continuation of the system which had existed under the Articles, which required the approval of nine states in Congress for any act of importance. Pinckney was supported by Mason, who stated that "The majority will be governed by their interests. The Southern states are the minority in both houses. Is it to be expected that they will deliver themselves bound hand and foot to the Eastern states."[168] Williamson and Randolph also spoke in favor of the proposition.

Wilson responded in opposition. "The majority, he said, would be no more governed by interest than the minority. It was surely better to let the latter be bound hand and foot than the former. Great inconveniences had, he contended, been experienced in Congress from the article of confederation requiring nine votes in certain cases."[169] And Sherman also reminded that "to require more than a majority to decide a question was always embarrassing as had been experienced in cases requiring the

[168] 2 Records 451.
[169] 2 Records 451.

votes of nine states in Congress."[170] Some Southern delegates refused to take a provincial view of the matter. The elder Pinckney said that "it was the true interest of the Southern states to have no regulation of commerce, but considering the loss brought on the commerce of the Eastern states by the revolution, their liberal conduct toward the views of South Carolina (i.e., on the slavery question) and the interest the weak Southern states had in being united with the strong Eastern states, he thought it proper that no fetters should be imposed on the power of making commercial regulations; and that his constituents, though prejudiced against the Eastern states, would be reconciled to this liberality. He had himself, he said, prejudice against the Eastern states before he came here, but would acknowledge that he had found them as liberal and candid as any men whatever."[171] And Rutledge was also "against the motion of his colleague. It did not follow from a grant of power to regulate trade, that it would be abused. At the worst a navigation act could bear hard a little while only on the Southern states. As we are laying the foundation for a great empire, we ought to take a permanent view of the subject and not look at the present moment only."[172]

It was Madison, however, who best expressed the wisdom of the national point of view. He observed that "the disadvantage to the Southern states from a navigation act lay chiefly in a temporary rise of freight, attended however with an increase of Southern as well as Northern shipping, with the emigration of Northern seaman and merchants to the Southern states, and with a removal of the existing and injurious retaliations among the states on each other. The power of foreign nations to obstruct our retaliating measures on them by a corrupt influence would also be less if a majority should be made competent than if two thirds of each house should be required for legislative acts in this case. An abuse of the power would be qualified with all these good effects. . . . He added that the Southern states would derive an essential advantage in the general security afforded by the increase of our maritime strength. He stated the vulnerable situation of them all, and of Virginia in particular. The increase of the coasting trade, and of seaman, would also be favorable to the Southern states, by increasing the consumption of their produce. If the wealth of the Eastern should in a still greater proportion be augmented, the wealth would contribute more to the public wants, and be otherwise a national benefit."[173] Confronted with the choice between a full national power or one fettered by the requirement of a two-thirds majority, the Convention rejected the Pinckney proposition. On September 15 Mason tried again to qualify the power with a two-thirds majo-

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[170] 2 Records 450.
[171] 2 Records 449-50.
[172] 2 Records 452.
[173] 2 Records 451-52.

rity, this time only until 1808, but again the Convention rejected the proposal.

One particular subject of commerce received special consideration. This was the slave trade. The resolutions approved by the committee of the whole contained no reference to this subject. The draft submitted by the Committee of Detail, however, explicitly reserved the matter for state power by providing that "No tax or duty shall be laid by the legislature ... on the migration or importation of such persons as the several states shall think proper to admit; nor shall such migration or importation be prohibited." When this came before the Convention on August 21 Luther Martin's detestation of slavery overcame his devotion to state sovereignty, and he proposed to vary this article "so as to allow a prohibition or tax on the importation of slaves," arguing that "such a clause would leave an encouragement to this traffic" and that "it was inconsistent with the principles of the Revolution and dishonorable to the American character to have such a feature in the Constitution."[174]

This motion was supported by Mason, who asserted that "The present question concerns not the importing states alone but the whole Union."[175] After discoursing on the evils of slavery, he said that "As to the states being in possession of the right to import, this was the case with many other rights, not to be properly given up. He held it essential to every point of view that the general government should have power to prevent the increase of slavery."[176] Dickinson said he "Considered it inadmissible, on every principle of honor and safety, that the importation of slaves should be authorized to the states by the Constitution. The true question was whether the national happiness would be promoted or impeded by the importation, and this question ought to be left to the national government, not to the states particularly interested."[177] And Langdon "Was strenuous for giving the power to the general government. He could not, with a good conscience, leave it with the states, who could then go on with the traffic, without being restrained by the opinions here given, that they will themselves cease to import slaves."[178]

Southern opposition to the Martin proposal was vigorous, even threatening. Rutledge asserted that "Religion and humanity had nothing to do with this question. Interest alone is the governing principle with nations. The true question at present is whether the southern states shall or shall not be parties to the Union."[179] He declared that "If the Convention thinks that North Carolina, South Carolina and Georgia

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1742 Records 364.
1752 Records 370.
1762 Records 370.
1772 Records 372.
1782 Records 373.
1792 Records 364.

will ever agree to the plan, unless their right to import slaves be untouched, the expectation is vain. The people of those states will never be such fools as to give up so important an interest."[180] The younger Pinckney stated that "South Carolina can never receive the plan if it prohibits the slave trade,"[181] and affirmed that "If slavery be wrong, it is justified by the example of all the world.... In all ages one half of mankind have been slaves. If the southern states were let alone, they will probably of themselves stop importations. He would himself, as a citizen of South Carolina, vote for it. An attempt to take away the right, as proposed, will produce serious objections to the Constitution, which he wished to see adopted."[182] The older Pinckney also argued that "the importation of slaves would be for the interest of the whole Union" and declared that he "should consider a rejection of the clause as an exclusion of South Carolina from the Union."[183] Baldwin said he had "conceived national objects alone to be before the Convention, not such as, like the present, were of a local nature."[184] And Williamson said he "thought the southern states could not be members of the Union, if the clause should be rejected, and that it was wrong to force any thing down not absolutely necessary, and which any state must disagree to."[185]

Some support was forthcoming from Northern delegates. Ellsworth said that he was "for leaving the clause as it stands. Let every state import what it pleases. The morality or wisdom of slavery are considerations belonging too the states themselves. What enriches a part enriches the whole, and the states are the best judge of their particular interest."[186] He urged "Let us not intermeddle.... Slavery in time will not be a speck in our country."[187] And Sherman "was for leaving the clause as it stands. He disapproved of the slave trade, yet as the states were now possessed of the right to import slaves, as the public good did not require it to be taken from them, and as it was expedient to have as few objections as possible to the proposed scheme of government, he thought it best to leave the matter as we find it."[188] He said "it was better to let the southern states import slaves than to part with them, if they make that a sine qua non."[189]

The matter was referred to a committee which on August 24, recommended the substitution of a provision which prohibited Congress from prohibiting the slave trade prior to 1800, but authorized a tax at a rate

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1802 Records 373.
1812 Records 364.
1822 Records 371.
1832 Records 371-2.
1842 Records 372.
1852 Records 373.
1862 Records 364.
1872 Records 371.
1882 Records 369.
1892 Records 374.

"not exceeding the average of duties laid on imports." This clause represented a substantial departure from the former one which prohibited all exercise of Congressional power over the subject. The power of Congress to prohibit the slave trade was now being expressly recognized, even though its exercise was to be postponed. Surprisingly enough, this compromise arrangement was agreeable to the Southern delegates, who were content with amendments advancing the year to 1808 and limiting the tax to ten dollars per person. In its final form the clause is found in Article I, Section 9 of the Constitution: "The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person." Its evolution clearly and expressly demonstrated the conscious shift from state to national power over the subject matter.

**Military Powers.**

The powers of the Confederation in the field of the military were more impressive, in terms of the scope of their grant and the efficacy of their exercise, than in any other field. Nonetheless, the powers of Congress which were enumerated in the draft of the Committee of Detail not only carried forward all powers existent under the Articles but, in two important respects, granted centralized power where it had not previously existed. Under the Articles Congress had the "sole and exclusive right and power of determining on peace and war...." These powers were separated in the Constitution. Congress was given power "to declare war," the verb "declare" being used rather than "make" in order to leave "to the executive power to repel sudden attacks."[190] The power to make peace was comprehended under the treaty power, hereinafter discussed. The Articles had empowered Congress to establish "rules for deciding in all cases what captures on land and water shall be legal, and in what manner prizes taken by land and naval forces in the service of the united states shall be divided or appropriated." The Constitution gave Congress the power "to make rules concerning captures on land and water." The Articles empowered Congress "to build and equip a navy." In the Constitution this became the power "to provide and maintain a navy." Under the Articles Congress had the power of "making rules for the government and regulation of the said land and naval forces, and directing their operations." The Constitution also granted Congress the power to "make rules for the government and regulation of the land and naval forces."

It was in connection with the land forces that two important ex-

[190] 2 Records 318.

tensions of power were provided in the Constitution. As to the raising of armies, the system of the Articles was a reflection of state sovereignty. Congress was given the power "to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state. . . ." Then there followed an elaboration of the assembling, clothing and equipping of the men. The tragic inadequacy of this quota and requisition system for raising the Continental army was discussed in a previous article. With state sovereignty no longer a necessary consideration, the Constitution provided simply that Congress should have power "to raise and support armies. . . ."

All of the foregoing provisions were agreed to without dissent. The subject of the state militia, however, raised a sharp debate over national and state power. During the Revolution each state maintained its own militia which was immune from Congressional power and control. The draft of the Committee of Detail went beyond the Articles so far as to grant Congress the power "to call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions." No opposition existed as to this clause, which was subsequently approved on August 23, after the deletion of the words "enforce treaties" on the ground that they were superfluous since treaties were comprehended under "the laws of the Union." The provision, it is noted, would have left with the states the organization and regulation of the militia.

When this provision came up on August 18, Mason urged the amplification of national power and "Introduced the subject of regulating the militia." He said he "thought such a power necessary to be given to the general government. . . . Thirteen states will never concur in any one system if the disciplining of the militia be left in their hands. If they will not give up the power over the whole, they probably will over a part as a select militia."[191] He therefore moved, "as an additional power, 'to make laws for the regulation and discipline of the militia of the several states, reserving to the states the appointment of officers.' He considered uniformity as necessary in the regulation of the militia, throughout the Union."[192] General Pinckney agreed that "Uniformity was essential. The states would never keep up a proper discipline of the militia."[193]

Ellsworth was more state-minded. He said he was "for going as far, in submitting the militia to the general government, as might be necessary, but thought the motion of Mr. Mason went too far. . . . The whole authority over the militia ought by no means to be taken away from the

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1912 Records 326.
1922 Records 330.
1932 Records 330.

states, whose consequence would pine away to nothing after such a sacrifice of power. He thought the general authority could not sufficiently pervade the Union for such a purpose, nor could it accomodate itself to the local genius of the people. It must be vain to ask the states to give the militia out of their hands."[194] In this view he had the support of Dickinson: "We are come now to a most important matter—that of the sword. His opinion was that the states never would nor ought to give up all authority over the militia."[195] In the face of this disagreement, Mason retreated to "the idea of a select militia. He was led to think that would be, in fact, as much as the general government could advantageously be charged with. He was afraid of creating insuperable objections to the plan."[196] He therefore withdrew his original motion, and instead moved for "a power to make laws for regulating and disciplining the militia, not exceeding one-tenth part in any one year, and reserving the appointment of officers to the states."

But this retreat did not satisfy the proponents of stronger national power in this area. Butler urged "the necessity of submitting the whole militia to the general authority, which had the care of the general defense."[197] General Pinckney "Renewed Mr. Mason's original motion. For a part to be under the general and a part under the state governments would be an incurable evil. He saw no room for such distrust of the general government."[198] Langdon seconded Pinckney's renewal, saying that he "saw no more reason to be afraid of the general government than of the state governments."[199] Madison also supported this view. He "thought the regulation of the militia naturally appertaining to the authority charged with the public defense. It did not seem, in its nature, to be divisible between two distinct authorities. If the states would trust the general government with a power over the public treasury, they would, from the same consideration of necessity, grant it the direction of the public force. Those who had a full view of the public situation would, from a sense of the danger, guard against it. The states would not be separately impressed with the general situation, nor have the due confidence in the concurrent exertions of each other."[200] The younger Pinckney thought "the power such a one as could not be abused, and that the states would see the necessity of surrendering it."[201] Gerry, on the other hand, "thought this the last point remaining to be surrendered. If it be agreed to by the Convention, the plan will have as black a mark

1942 Records 330-1.
1952 Records 331.
1962 Records 331.
1972 Records 331.
1982 Records 331.
1992 Records 331.
2002 Records 332.
2012 Records 332.

as was set on Cain. He had no such confidence in the general government as some gentlemen possessed, and believed it would be found that the states have not."[202]

The upshot was that the matter was referred to a committee. The report submitted on August 21 was a distinct victory for the nationalists. It recommended that Congress have the power "to make laws for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by the United States."[203] This broad grant gave Congress complete power over the subject except for the appointment of officers. On August 23, when the matter was taken up again, Ellsworth observed "that the term discipline was of vast extent, and might be so expounded as to include all power on the subject."[204] Gerry declared that "This power in the United States . . . is making the states drill sergeants. He had as lief the citizens of Massachusetts be disarmed as to take the command from the states and subject them to the general legislature. It would be regarded as a system of despotism."[205] Ellsworth and Sherman thereupon sought to modify the power by substituting the following: "To establish an uniformity of arms, exercise and organization for the militia, and to provide for the government of them when called into the service of the United States," explaining that the "object of this proposition was to refer the plan for the militia to the general government, but to leave the execution of it to the state governments."[206]

But even this dilution of national power was opposed. Langdon said "he could not understand the jealousy expressed by some gentlemen. The general and state governments were not enemies to each other but different institutions for the good of the people of America. As one of the people, he could say, the national government is mine, the state government is mine. In transferring power from one to the other, I only take out of my left hand what it cannot so well use and put it into my right hand where it can be better used."[207] Madison was vigorous in support of national power. "The primary object is to secure an effectual discipline of the militia. This will no more be done if left to the states separately than the requisitions have been hitherto paid by them. The states neglect their militia now, and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety, and the less prepare its militia for that purpose, in like manner

202 2 Records 332.
203 2 Records 356.
204 2 Records 385.
205 2 Records 385.
206 2 Records 386.
207 2 Records 386.

as the militia of a state would have been still more neglected if each county had been independently charged with the care of its militia. The discipline of the militia is evidently a *national* concern, and ought to be provided for in the *national* Constitution."[208] And Randolph said that he "was for trammeling the general government whenever there was danger, but here there could be none. He urged this as an essential point, observing that the militia were everywhere neglected by the state legislatures, the members of which courted popularity too much to enforce a proper discipline. Leaving the appointment of officers to the states protects the people against every apprehension that could produce murmur."[209] On the vote, all states were opposed to Ellsworth's motion except his own, Connecticut.

Madison then sought to increase national power even further by a motion to amend the clause so that the reservation to the states of the appointment of officers should be confined to those "under the rank of general officers." Sherman said he "Considered this as absolutely inadmissible."[210] And Gerry was bitter. "Let us at once destroy the state governments, have an executive for life or hereditary, and a proper Senate; and then there would be some consistency in giving full powers to the general government; but as the states are not to be abolished, he wondered at the attempts that were made to give powers inconsistent with their exercise. He warned the Convention against pushing the experiment too far."[211] Madison replied that "As the greatest danger is that of disunion of the states, it is necessary to guard against it by sufficient power to the common government; and as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good militia."[212] The majority however, evidently feeling that the states should have the sop of appointing the officers, defeated Madison's motion, eight to three.

The committee recommendation was then approved, and appears verbatim in the Constitution. The action of the Convention on this subject affords good reason for the subsequent disuse of the phrase "state militia" and the adoption of the more accurate title of "National Guard."

**Naturalization.**

The Articles of Confederation made no mention of any national citizenship, state citizenship only being recognized. This was natural since the Articles created no nation, but merely a compact of sovereign states. Consequently, each state legislated for itself on the admission of

208 2 Records 386-7.
209 2 Records 387.
210 2 Records 388.
211 2 Records 388.
212 2 Records 388.

foreigners to citizenship, and Congress had no power whatever over the subject. As would be expected, the state laws varied considerably from each other. In the Convention Mason noted that "The states have formed different qualifications themselves for enjoying different rights of citizenship."[213] And the younger Pinckney remarked "that the laws of the states had varied much the terms of naturalization in different parts of America and contended that the United States could not be bound to respect them on such an occasion as the present. It was a sort of recurrence to first principles."[214]

As previously noted, the Constitution, unlike the Articles, did explicitly recognize a citizenship of the United States. As noted also, however, it did not define this citizenship. It seems to have been tacitly assumed that anyone who was a citizen of his state prior to the adoption of the Constitution would be a citizen of the United States after ratification. This concept was even made retroactive in order to permit the election of a Congress at the outset of the new government, for one of the requirements for membership in the House and Senate was citizenship in the United States for seven and nine years, respectively. Aside from this, there remained the questions of who was to decide what constituted United States citizenship and how it was to be acquired. The Constitution was silent on the acquisition of citizenship by birth and on the relationship between state and national citizenship, which were later the subjects of intense disagreement in the controversy over slavery, and which were finally settled by the Fourteenth Amendment.

The Convention was more concerned with the expectation that after the Constitution was ratified, there would be a tide of immigration from the old world. The acquisition of citizenship by naturalization therefore assumed an immediate importance, and as to this, there was unanimous agreement that this was a matter to be vested within the exclusive power of Congress. The Committee of Detail made the recommendation which was approved on August 16, without debate or dissent, and which appears in clause 4 of Article I, Section 8 as the power "to establish a uniform rule of naturalization . . . throughout the United States." Inasmuch as there would be no uniform rule if the states retained concurrent power, the grant was of necessity exclusive, and inasmuch as the power to confer citizenship is a power incident to sovereignty, the grant is one more example of the conscious creation of a national sovereignty.

**Specified Crimes.**

Under the Articles, Congress had the "sole and exclusive power" of "appointing courts for the trial of piracies and felonies committed on

213 2 Records 271.
214 2 Records 271.

the high seas." But the power to define the crimes was not granted, and the common law as to felonies varied among the states. The Committee of Detail recommended that Congress have the power "to declare the law and punishment of piracies and felonies committed on the high seas, . . . and offenses against the law of nations." When this clause came up for discussion on August 17, Mason observed that he "doubted also the propriety of taking the power in all these cases wholly from the states."[215] But Morris and Madison moved to amend the power to one "to define and punish." Madison asserted that "If the laws of the states were to prevail on this subject, the citizens of different states would be subject to different punishments for the same offense at sea. There would be neither uniformity not stability in the law. The proper remedy for all these difficulties was to vest the power proposed by the term 'define' in the national legislature."[216] This view prevailed and the grant appears in Article I, Section 8, Clause 10 as the power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." The last clause is one further proof that the Framers were consciously creating a nation.

**Patents and Copyrights.**

Under the Articles, Congress had no power over patents and copyrights. Most of the states had enacted copyright legislation which varied among the states, and patents were usually granted by special acts. Only if the national government possessed power over these matters could authors and inventors enjoy protection in their rights uniformly throughout the United States. Consequently, Madison on August 18 suggested the inclusion of such a power. A clause recommended by the committee on unfinished business was approved on September 5 without discussion and debate. It appears in Article I, Section 8, Clause 8, as the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

**Seat of Government.**

Under the Articles, there was no seat of government nor any power to provide for one. Congress assembled in Philadelphia until 1783, from which they fled when the local authorities failed to protect them against mutinous troops. They reassembled at Princeton, then sat alternately at Trenton and Annapolis until 1785, when they repaired to New York, where they sat until the adoption of the Constitution.

There seems to have been unanimous agreement in the Convention that the new national government should have a capitol of its own. On

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[215] 2 Records 315.
[216] 2 Records 316.

July 26 Mason "observed that it would be proper, as he thought, that some provision should be made in the Constitution against choosing for the seat of the general government the city or place at which the seat of any state government might be fixed. There were two objections against having them at the same place, which, without mentioning others, required some precaution on the subject. The first was that it tended to produce disputes concerning jurisdiction. The second and principal one was that the intermixture of the two legislatures tended to give a provincial tincture to the national deliberations."[217] Gerry also said that he "Conceived it to be the general sense of America that neither the seat of a state government nor any large commercial city should be the seat of the general government."[218] The younger Pinckney thought "the seat of a state government ought to be avoided."[219] And Butler was "for fixing, by the Constitution, the place, and a central one, for the seat of the national government."[220]

On August 18 Madison submitted a proposal to accomplish this objective, and a clause reported by the committee on unfinished business on September 5 was approved without discussion or dissent. It appears in Article I, Section 8, Clause 17, as the power "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States . . . ."

The proposal of the committee on unfinished business also contained the power "to exercise like authority over all places purchased for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." Gerry objected, contending that "this power might be made use of to enslave any particular state by buying up its territory, and that the strongholds proposed would be a means of awing the state into an undue obedience to the general government."[221] King replied, saying that he "thought, himself, the provision unnecessary, the power being already involved, but would move to insert after the word 'purchased' the words 'by the consent of the legislature of the state.' This would certainly make the power safe."[222] The motion was adopted and, as amended, the clause was agreed to. It appears also in Clause 17.

**Elections.**

The power of Congress to regulate the times, places and manner of holding elections for senators and representatives has been previously discussed under the heading "A National Legislature."

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217 2 Records 127.
218 2 Records 127.
219 2 Records 127.
220 2 Records 128.
221 2 Records 510.
222 2 Records 510.

**Full Faith and Credit.**

The Articles of Confederation had provided that "Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state." It will be noted that this provision related only to "courts and magistrates." Further, it contained no mention of the method of proving the "records, acts and judicial proceedings" nor did it deal with the effect which should be given to them, once proved. As to these matters—proof and effect—the laws of the states were controlling. The general guarantee of the Articles was therefore subject to the will of sovereign states for meaningful application. The draft of the Committee of Detail provided that "Full faith shall be given in each state to the acts of the legislatures, and to the records and judicial proceedings of the courts and magistrates, of every other state." This proposal went farther than the Articles in that it also applied to the acts of the legislatures.

When this provision came up for discussion on August 29, Williamson "Moved to substitute, in place of it, the words of the Articles of Confederation on the same subject."[223] Wilson, Johnson and Gorham supported the proposal, however, and Madison wanted to go even farther. He said he "wished the legislature might be authorized to provide for the *execution* of judgments in other states, under such regulations as might be expedient. He thought that this might be safely done, and was justified by the nature of the Union."[224] To which Randolph replied that "there was no instance of one nation executing judgments of the courts of another nation."[225] He then offered his own proposal. Gouverneur Morris then offered a proposition which, for the first time, granted to Congress new and broad power over the subject. This was that "Full faith ought to be given in each state to the public acts, records, and judicial proceedings, of every other state; and the legislature shall, by general laws, determine the proof and effect of such acts, records, and proceedings." The draft proposal, Randolph's proposal, and Morris's proposition were all then referred to a committee.

The committee report on September 1 adopted Morris's proposal that Congress be vested with power over the subject. "Full faith and credit ought to be given in each state to the public acts, records, and judicial proceedings of every other state; and the legislature shall, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect which judgments obtained in one state shall have in another." This provision went farther than the draft proposal in that it authorized a broad national power but it did not go

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223 2 Records 447.
224 2 Records 448.
225 2 Records 448.

as far as Morris's proposition, since the power of Congress to determine effect was confined to state judgments. Morris therefore moved to accomplish his original purpose by substituting the word "thereof" for all after "effect." Johnson recognized that "the amendment, as worded, would authorize the general legislature to declare the effect of legislative acts of one state in another state."[226] Randolph, who by September was increasingly disenchanted with the trend of the Convention, objected. He said he "Considered it as strengthening the general objection against the plan that its definition of the powers of the government was so loose as to give it opportunities of usurping all the state powers. He was for not going further than the report, which enables the legislature to provide for the effect of *judgments*."[227] But Morris's motion was approved, six states to three. Then, on motion of Madison, "ought" was changed to "shall" in the first part of the provision, thus making full faith and credit mandatory on the states; and "shall" was changed to "may" in the second part of the provision, thus making the power of Congress discretionary. As finally approved, the provision appears in Section 1 of Article IV of the Constitution: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." The progress of this provision through the Convention reveals clearly a steady and conscious enhancement of national power.

**Admission of New States.**

The Articles of Confederation had contained the following provision: "Canada acceding to this confederation, and joining in the measures of the united states, shall be admitted into, and entitled to all the advantages of this union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine states." Under this language, considerable doubt had existed as to the power to admit a portion of one of the thirteen states as a new state, which doubt created opposition to the admission of Vermont, Kentucky and Franklin. Furthermore, there was no provision in the Articles which contemplated the formation and admission of states out of the great territory to the west. Notwithstanding the absence of any authorization in the Articles, Congress had encouraged and accepted the cession of the Western land from the states, asserting title thereto under a resolution which promised that such land should be formed into distinct republican states, which should be admitted on an equal footing with present members of the confederation. The Northwest Ordinance

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2262 Records 488.
2272 Records 488-89.

of 1787, enacted by Congress on July 13, while the Convention was in session, provided for five new states to be formed from lands north of the Ohio River, to be admitted on an equal footing with the original states.

The absence of power over this subject was cured by the Convention. The Virginia plan had provided for "admission of states lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the national legislature less than the whole." This was a radical departure from state sovereignty in that it would permit admission of new states by voice vote in the legislature rather than by vote of the states as such. This proposal was approved by the committee of the whole without change. The draft of the Committee of Detail was more specific. It provided that "New states lawfully constituted or established within the limits of the United States may be admitted by the legislature into this government; but to such admission the consent of two-thirds of the members present in each house shall be necessary. If a new state shall arise within the limits of any of the present states, the consent of the legislatures of such states shall be also necessary to its admission. If the admission be consented to, the new states shall be admitted on the same terms with the original states."

This proposition was debated on August 29 and 30, with the result that the requirement of a two-thirds vote and the provision for equality of new states were both deleted. The language respecting the territorial integrity of the states was modified, and it is interesting to note that it was strongly opposed by Luther Martin. Although Martin was one of the few defenders of state sovereignty in the Convention, he was also from a small state, and was therefore not averse to carving up the large ones. "Nothing, he said, would so alarm the limited states as to make the consent of the large states claiming the western lands necessary to the establishment of new states within their limits."[228] But Wilson, the nationalist, replied that he "knew nothing that would give greater or juster alarm than the doctrine that a political society is to be torn asunder without its own consent."[229] The final version is found in Section 3 of Article IV: "New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislaures of the states concerned as well as of the Congress." The provision affords one more example of the conscious departure from a compact of sovereign states.

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228 2 Records 455.
229 2 Records 462.

**Territories and Other Property.**

The Articles of Confederation contained no provision relating to the ownership of territory by the United States. As noted, however, Congress had nevertheless accepted title in the name of the United States to an enormous expanse of territory in the west. The power of Congress to admit new states from this territory was no longer in doubt, as a result of the action just narrated. But what of the government of the territory prior to the admission of new states or of territory which would possibly not be included in new states? This deficiency in the power of Congress was cured on August 30 when Morris moved the provision which was accepted without discussion or dissent and appears in Article IV, Section 3, Clause 2 of the Constitution: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belong to the United States . . . ."

**Necessary and Proper Laws.**

Article II of the Articles of Confederation provided that "Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assesmbled." Upon this provision foundered the many efforts to enlarge by implication the powers of Congress during the Confederation. As noted in the first part of this section, the Virginia plan originally contemplated a broad general legislative power which was amplified even more by the committee of the whole and approved in the following form: "Resolved, that the national legislature ought to possess the legislative rights vested in Congress by the Confederation; and moreover, to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."

As noted also, the draft submitted by the Committee of Detail substituted for this broad general grant an enumeration of specific powers of Congress. Most of these are found in Section 8 of Article I, which deals with the legislative branch. Others, however, are found in other sections of Article I and many powers of Congress are scattered throughout the various other articles of the Constitution. These are the powers we have been discussing, and it will be noted that they deal with specific subjects, e.g., taxation, commerce, military forces, naturalization, elections, etc. One power of Congress, however, which was recommended by the Committee of Detail was not a specific but a general power. The last clause of Section 8 grants to Congress the power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the govern-

ment of the United States, or in any department or officer thereof." When this provision came before the Convention on August 20, Madison and the younger Pinckney moved to insert the words "and establish all offices" after the word "laws." on the ground that it was "liable to cavil that the latter was not included in the former."[230] But Gouverneur Morris, Wilson, Rutledge and Ellsworth all "Urged that the amendment could not be necessary,"[231] and it was defeated, nine to two. There was no further discussion, and the Convention approved the clause without dissent.

This provision was later referred to as "the sweeping clause" by the opponents of the Constitution, and its scope was a matter of intense debate in the ratification campaign. There seems to be no room for doubt that the function of the clause, at the very least, was to permit the exercise of implied powers and thus to repudiate Article II of the Articles of Confederation. It is arguable that much more was accomplished by the clause. On its face, it amplifies not only the previously listed specific powers of Congress, but all other powers of the government of the United States—the legislative powers set forth elsewhere in the Constitution, the executive powers, and the judicial powers. It might also be noted that there is nothing in the records of the Convention to indicate that the Convention intended that Congress should have less power after enumeration than was contemplated under the former general grant; the sum of one hundred is no less when ten is listed ten times than when the full sum is set forth in one figure. For the purpose of this study, however, it is sufficient to state that the scope of this power was indeterminate, for whatever its scope, it represented to that extent a still further assimilation in Congress of what had formerly been within the legislative power of sovereign states.

**Self-protection by the States.**

Although the powers of Congress were enumerated, they were not defined. No precise or particularized meaning automatically or inevitably attached to such words and phrases as, for example, "the common defense and general welfare," or "regulate commerce . . . among the several states," or, above all, "laws which may be necessary and proper." The fact that the enumerated powers of Congress were latitudinal in nature afforded one of the principal grounds of opposition to the ratification of the Constitution, for the fact was of enormous practical significance to the question of state sovereignty and state power. For the powers of Congress were to be exercised, without the intervention of the states, directly upon individuals in areas formerly within the exclusive province of the states. The express limitations in the Constitution on

230 2 Records 345.
231 2 Records 345.

these national powers were few and of limited scope. The extent to which state sovereignty and state power would be reduced and displaced by the legislative powers of the national government would depend upon two factors. One was the scope and breadth of the meaning and application which would be given to the national powers, and the other was the extent to which those powers actually would be used in the operation of the national government. Even under a minimal view, the displacement of state by national power was considerable. Potentially, the inroad on the powers and jurisdiction of the states was enormous. Unless the purpose was virtually to annihilate the powers of the states, as opponents of the Constitution charged, some limiting factor was required. As will be seen later, the power to determine the scope of national power was confined to the instrumentalities of the national government, with some degree of remedial power in the states through the amending process. In determining the extent to which the legislative powers would be actually used, however, the states as such were given an important control for their own self-protection. This control lay in the provision adopted by the Convention and found in Article I, Section 3, Clause 1 of the Constitution: "The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof . . . ."

The role of the Senate as the upper house in a bicameral legislature has been discussed. The requirement of equal representation of states in the Senate has usually been depicted as a device whereby the small states would be protected against the large states. Without gainsaying the validity of these two purposes of the Senate, the debates in the Convention clearly reveal a third purpose. This was to enable the states as such, whether large or small, to participate in the political process whereby the national legislative powers were to be exercised, and thus to be afforded an opportunity to protect themselves against the exercise of what were recognized as potentially destructive powers. For this purpose, appointment of senators by the state legislatures was equally as important as equality of representation. Sherman, on July 14, "urged the equality of votes not so much as a security for the small states, as for the state governments, which could not be preserved unless they were represented and had a negative in the general government."[232] There was agreement among all shades of opinion in the Convention as to whom the Senate was to represent. Madison, the advanced nationalist, "observed that the Senate represented the States alone . . . ."[233] Mason, the moderate nationalist, stated that "the Senate did not represent the *people,* but the *States* in their political character."[234] And Luther Martin, the state

232 2 Records 5.
233 2 Records 392.
234 2 Records 273.

sovereignty advocate, agreed that "the Senate is to represent the States . . . ."[235]

Statements made by other delegates indicate the generality of the understanding as to the function of the Senate as a forum for the protection of state interests against national power. Thus, Dickinson on June 6 said he "considered it essential that one branch of the legislature should be drawn immediately from the people, and as expedient that the other should be chosen by the legislatures of the states . . . . This combination of the state governments with the national government was as politic as it was unavoidable . . . . He was for a strong national government, but for leaving the states a considerable agency in the system."[236] Again on June 7 he argued for equal representation in this fashion: "The preservation of the states in a certain degree of agency is indispensable. It will produce that collision between the different authorities which should be wished for in order to check each other . . . . If the state governments were excluded from all agency in the national one, and all power drawn from the people at large, the consequence would be that the national government would move in the same direction as the state governments now do, and would run into all the same mischiefs. The reform would only unite the thirteen small streams into one great current pursuing the same course without any opposition whatever."[237]

Wilson also recognized the position, although he disagreed with it. On June 21 he stated: "As the plan now stood, though indeed contrary to his opinion, one branch of the general government, the Senate or second branch, was to be appointed by the state legislatures. The state legislatures, therefore, by this participation in the general government, would have an opportunity of defending their rights."[238] On June 28 he noted that "The leading argument of those who contend for equality of votes among the states is that the states as such being equal, and being represented not as districts of individuals, but in their political and corporate capacities, are entitled to an equality of suffrage."[239] And on July 14 he stated that "The justice of the general principle of proportional representation has not in argument at least been yet contradicted. But it is said that a departure from it so far as to give the states an equal vote in one branch of the legislature is essential to their preservation."[240] In addition to Wilson, Pierce on May 31 said that "If the influence of the states is not lost in some part of the new government, we shall never have anything like a national institution. But in my opinion it will be

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235 2 Records 292.
236 1 Records 136.
237 1 Records 152-3.
238 1 Records 355.
239 1 Records 449-50.
240 2 Records 10.

right to show the sovereignty of the state in one branch of the legislature, and that should be in the Senate."[241]

The position was elaborated to the fullest, however, by Mason and Johnson. On June 7 Mason declared that "whatever power may be necessary for the national government, a certain portion must necessarily be left in the states. It is impossible for one power to pervade the extreme parts of the United States so as to carry equal justice to them. The state legislatures also ought to have some means of defending themselves against encroachments of the national government. In every other department we have studiously endeavored to provide for its self-defense. Shall we leave the states alone unprovided with the means for this purpose? And what better means can we provide than the giving them some share in, or rather make them a constituent part of, the national establishment."[242] King recorded him the same day as follows: "The danger is that the national will swallow up the state legislatures. What will be a reasonable guard against this danger and operate in favor of the state authorities? The answer seems to me to be this, let the state legislatures appoint the Senate."[243] And on June 25 he crystallized the position. "It has been agreed on all hands that an efficient government is necessary, that to render it such it ought to have the faculty of self-defense, that to render its different branches effectual each of them ought to have the same power of self-defense. He did not wonder that such an agreement should have prevailed in these points. He only wondered that there should be any disagreement about the necessity of allowing the state governments the same self-defense. If they are to be preserved, as he conceived to be essential, they certainly ought to have this power, and the only mode left of giving it to them, was by allowing them to appoint the second branch of the national legislature."[244]

Likewise Johnson, who discussed this point on June 21. "On a comparison of the two plans which had been proposed from Virginia and New Jersey, it appeared that the peculiarity which characterized the latter was its being calculated to preserve the individuality of the states. The plan from Virginia did not profess to destroy this individuality altogether, but was charged with such a tendency. One gentleman alone, Colonel Hamilton, in his animadversions on the plan of New Jersey, boldly and decisively contended for an abolition of the state governments. Mr. Wilson and the gentleman from Virginia who were also adversaries of the plan of New Jersey held a different language. They wished to leave the states in possession of a considerable, though a subordinate, jurisdiction. They had not yet, however, shown how this could

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241 1 Records 59.
242 1 Records 155.
243 1 Records 160.
244 1 Records 407.

consist with, or be secured against, the general sovereignty and jurisdiction which they proposed to give to the national government. If this could be shown in such a manner as to satisfy the patrons of the New Jersey propositions, that the individuality of the states would not be endangered, many of their objections would no doubt be removed. If this could not be shown, their objections would have their full force. He wished it therefore to be well considered whether in case the states, as was proposed, should retain some portion of sovereignty at least, this portion could be preserved without allowing them to participate effectually in the general government, without giving them each a distinct and equal vote for the purpose of defending themselves in the general councils."[245]

On June 29, discussing the matter of representation, Johnson again discussed the point. "The controversy must be endless whilst gentlemen differ in the grounds of their arguments, those on one side considering the states as districts of people composing one political society, those on the other considering them as so many political societies. The fact is that the states do exist as political societies, and a government is to be formed for them in their political capacity, as well as for the individuals composing them. Does it not seem to follow, that if the states as such are to exist, they must be armed with some power of self-defense? This is the idea of Colonel Mason who appears to have looked to the bottom of this matter. Besides the aristocratic and other interests, the states have their interests as such, and are equally entitled to like means. On the whole he thought that as in some respects the states are to be considered in the political capacity, and in others as districts of individual citizens, the two ideas embraced on different sides, instead of being opposed to each other, ought to be combined, that in one branch the people ought to be represented, in the other, the states."[246]

On June 16 Pinckney made the acute observation: "Give New Jersey an equal vote, and she will dismiss her scruples, and concur in the national system."[247] The record bears out this estimate. It was on July 16 that the Convention approved the compromise under which the states were accorded equal representation in the Senate. The very next day the states which had fought for this equal representation joined in approving a general legislative power in Congress "To enjoy the legislative rights vested in Congress by the Confederation, and moreover to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."

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245 1 Records 354-5.
246 1 Records 461-2.
247 1 Records 255.

It is clear, therefore, that equality of representation in the Senate, with appointment of Senators by the state legislatures, was considered by the Convention as providing a political means whereby the states as such could protect themselves against what they considered excessive exercise of national powers. The fact that such a self-protective device was considered to be necessary demonstrates the understanding that there were few definite legal limits to the possible exercise of national power, and a recognition that the existence of state power was not one of these limitations. This meant that without some means of self-protection, the states would be virtually helpless, and this, of course, is merely another way of saying that, in relation to the national government, the states under the Constitution were no longer to be sovereign either in law or in fact.

But even this provision for the participation by the states in the exercise of national legislative power was diluted by the provision for individual voting in the Senate. Although representation was equal, per capita voting rather than voting by states raised the possibility of the senators from a state voting differently, and thus dissipating the influence of their state as such in the making of decisions. Curiously, it was Gerry who first suggested that the vote in the Senate should be individual, rather than by states. On July 14 he said he favored "providing that the states should vote per capita, which he said would prevent the delays and inconveniences that had been experienced in Congress and would give a national aspect and spirit to the management of business."[248] Sherman said he "had no objection to the members in the second branch voting per capita."[249] No action was taken, however, until July 23 when Gouverneur Morris and King moved that Senators should vote per capita. It is interesting and significant that the only objection to this proposal was made by Luther Martin, defender of state sovereignty, who "was opposed to voting per capita, as departing from the idea of the *states* being represented in the second branch."[250] The motion carried, nine states to one. The Committee of Detail included such a provision in its draft, and it was approved on August 9, in spite of a move to postpone it. In final form the provision is part of Article I, Section 3, Clause I: ". . . and each senator shall have one vote."

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248 2 Records 5.
249 2 Records 5.
250 2 Records 94.

# THE SHORT-TERM TRUST†

*Chalmers W. Alexander**

The stort-term trust provides a means by which a person in the high income tax brackets can shift the income from income-producing property to a lower tax bracket trust, or trust beneficiary, and thereby effect a desirable income tax saving.[1] During the term of the trust, the income will be taxed to the trust if accumulated and to the beneficiary if distributed.[2] At the termination of the trust, the grantor who created it receives back his property and all of its subsequent income is his.

This type of trust was brought into being by sections 671 through 678 of the Internal Revenue Code of 1954. These sections are in general a codification, with some modifications and simplifications, of the earlier Clifford Regulations[3] which were based on the U. S. Supreme Court's decision, rendered in 1940, in the case of *Helvering v. Clifford*.[4]

The short-term trust is of decided advantage to a grantor during those years when his income is highest. He can shift income, which would be taxable to him at very high rates and, at the conclusion of the trust, recover his property and all future income at a time when his earnings and income have become diminished.

## ILLUSTRATIONS OF TAX SAVING

Here is an illustration of how taxes can be saved by means of a short-term trust. If a married man, who is in the 50% income tax bracket, owns $100,000.00 of U. S. Government securities, for instance, which produce income of $4,000.00 per year, he would have only $2,000.00 of spendable income remaining after paying taxes. But he could take this $100,000.00 of securities and place them in a ten-year trust, for the benefit of his wife, with the provision that the income be accumulated for or paid to her in the discretion of the trustee. If the income were paid to her each year there would be no tax saving because the income would be taxable on their joint income tax return. But if the income is accumulated, the trust, which has a $100.00 exemption of its own,[5] will pay income tax

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The Internal Revenue Code of 1954 is cited in the footnotes as "I.R.C." and the U. S. Treasury Regulations (1956) as "Reg."

1CASEY, ESTATE PLANS, ¶ 16,924.

2I.R.C. §§ 652, 661.

3Johnson, *Trusts and the Grantor*, 36 TAXES 871 (1958).

4309 U.S. 331 (1940).

5I.R.C. § 642(b).

yearly of only $780.00, and $3,220.00 of income will remain in the trust after taxes. The yearly tax saving will amount to $1,220.00, this being the difference between the $2,000.00 in taxes that the grantor would have had to pay on the income and the $780.00 that the trust would pay on it.

At the conclusion of this ten-year trust, the wife will receive $32,200.00 of accumulated income, and this sum would not be taxable in her husband's estate at his death. The husband will receive back his $100,000.00 of securities. The family group will have saved $12,200.00 of income taxes during the ten-year period.[6]

Now suppose this same taxpayer has two children, one 7 years of age and the other 5 years old, and he desires to build up a fund for them rather than for his wife. He could create two ten-year trusts, one for each child's benefit, and place $50,000.00 of those same 4% securities in each, with the direction that the trust pay $599.00 yearly to its beneficiary and accumulate the remainder of the income. If the children have no other income, they would not be required to file individual income tax returns since the income of each is less than $600.00. The father, of course, is entitled to claim exemptions for both children on his own return, if he provides their chief support. Moreover, as the trust is entitled to a $100.00 exemption, each trust will pay only about $260.00 of income tax each year. Both trusts combined will pay only about $520.00 of income tax yearly whereas the father would have had to pay $2,000.00 of tax on the same income. The resultant tax saving is $1,480.00 annually. After the ten-year trust terminates and the father recovers his $100,000.00 of securities, the family group will have effected income tax saving of $14,800.00, and the sum of $17,400.00 will have been built up for each child's future use provided, of course, the child has put into a savings fund the annual trust distribution of $599.00.[7]

In the above illustration, each trust could distribute as much as $674.99 to its beneficiary yearly and even more taxes would be saved over the ten-year period. The father, if he provided their chief support and the children were under nineteen years of age or were students, could still claim income tax exemptions for them. Each child, however, even though he would owe no tax, would be required to file an individual income tax return because his yearly income would amount to $600.00 or more.[8]

The gift tax consequences of transfers of property in trust will be mentioned in a later part of this discussion.

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[6]Yohlin, *Saving Taxes by Short-Term Trusts,* PRAC. LAW. 38 (Feb. 1959).

[7]CASEY, *supra* note 1, para. 16,926.3. See also Yohlin, *supra* note 6, at 39-40.

[8]Yohlin, *supra* note 6, at 39-40.

## TRUSTS FOR MINOR CHILDREN

It should be mentioned here that where income of a trust is expended for the support or maintenance of a beneficiary, such as his minor child, whom the grantor is legally obligated to support or maintain, the grantor will be taxed on the trust income so expended.[9] If the grantor is the grandfather of the beneficiary and the income is used for the minor child's necessary support, the amount of income so used may possibly be taxed to the father of the child.[10]

Courts in some states have held that a child's college education is a necessity and the father is legally obligated to pay a minor child's college expenses.[11] In those states, if any income from a trust is used for such college expenses, and the grantor is the minor child's father, the trust income so expended will be taxed to the father. In Mississippi, the state laws on compulsory education were repealed in 1956.[12] Whether courts in Mississippi might now hold that a college education is considered a necessity for the minor child of prosperous parents, who are themselves college graduates and members of families where a college education is an accepted matter, is debatable.[12a]

If the grantor, when he creates the trust, is careful to provide that during its term income shall be applied only for items that are not part of his child's support, or that the income is to be accumulated and paid in a lump-sum to the beneficiary at the expiration of the trust, then the father will not be taxed on the income of the trust.[13] After the trust terminates, there is no limitation on the use to which the minor beneficiary may thereafter put the lump-sum payment which he has received, for taxes have already been paid on the income and the trust is now no longer in existence.[14] If the beneficiary is an adult child, the father will not be taxed on current expenditures of trust income to the beneficiary for any purpose because the father is not obligated to support an adult child.

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[9]I.R.C. § 677 (b); Reg. § 1.662 (a)-4.

[10]Colgan, *The Short-Term Trust,* 36 TRUST BULL. 63 (1956).

[11]Jackman v. Short, 165 Or. 625, 109 P.2d 860 (1941); Peacock v. Linton, 22. R.I. 328, 47 Atl. 887 (1901); Esteb v. Esteb, 138 Wash. 174, 244 Pac. 264 (1926). See also Grotheer, *Short-Term Trusts and Their Pitfalls,* 38 TRUST BULL. 28 (1959).

[12]MISS. LAWS, ch. 288 (1956), repealing §§ 6509, 6510, 6512-6517 MISS. CODE ANN. (1942).

[12a]The Mississippi Supreme Court in *Pass v. Pass,* rendered on March 21, 1960, held that a divorced father, to the extent of his financial ability, has a legal obligation to provide a college education for his minor child having an aptitude for higher education.

[13]TRACHTMAN, ESTATE PLANNING 151 (rev. ed. 1959).

[14]Yohlin, *supra* note 6, at 48.

## PRACTICAL USES OF TRUSTS

In addition to the uses indicated by the two illustrations given, short-term trusts can be put to work for such practical purposes as the following:

1. To provide for the support of relatives.
2. To provide funds for an insurance program for members of the family.
3. To built a retirement fund for a member of the family.
4. To provide funds with which your son can buy a deceased partner's interest in your business.
5. To set up a charitable gift.[15]

## DURATION OF THE TRUST

In order for the grantor to avoid being taxed on the income of the trust it must have a duration of ten years or more. The trust term may be for less than ten years if it is based upon the life of the income beneficiary, regardless of his life expectancy. The duration of the trust may be made to depend on the life of the grantor or any other individual but, unlike the income beneficiary, the grantor or such other person must have a life expectancy of at least ten years. The trust, then, could be made to terminate and the trust principal revert to the grantor on the happening of whichever one of the following events occurred first; (1) the expiration of ten years, or (2) the death of the beneficiary, regardless of his life expectancy, or (3) the death of the grantor or some other person, provided his or her life expectancy is at least ten years.[16]

A special form of short-term trust permissible is the trust for charity, and its term may be for as little as two years. During this trust's duration the income may be paid to a church or religious order, to a hospital or to a school. The beneficiary must be a particular charity for the two-year period; the income could not go to "X" hospital one year and "Y" hospital the next. However, 50% of the income could go to "X" hospital, and 50% to "Y", for the two-year period. The two-year trust for charity is of decided advantage to a wealthy individual or high income earner who exhausts each year the allowable charitable deductions for income tax purposes (20% generally plus 10% additionally to religious causes, hospitals or tax-exempt educational organizations), for by means of it he can make additional charitable gifts without parting permanently with his income-producing property.[17]

If, before any short-term trust expires, the grantor extends the date

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[15]Lipp, *How to Save Big Tax Dollars with a Short-Term Trust,* MANAGEMENT METHODS 45 (March 1959); Grotheer, *supra* note 11.

[16]Reg. § 1.673 (a)-1 (a)- (c); Yohlin, *supra* note 6, at 41-42.

[17]Reg. § 1.673 (b)-1 (a)- (c); Yohlin, *supra* note 6, at 43-45.

of its termination, a new trust term is considered to have been created as of the date of this postponement. Assume, for illustration, that a trust which originally was for a term of ten years is extended at the end of the ninth year so that it will have a total term of fourteen years. A new five-year trust is considered to have been created. However, the income of the first year of such new term is not taxed to the grantor since that year constitutes the tenth year of the original ten-year trust. The grantor would be taxed on the income during the four remaining years of that new term, for the income would be regarded as income from a trust of less than ten years' duration.[18]

After a grantor has established a ten-year trust and it has been in operation for a while, if he places additional assets in the trust he will be taxed on the income from these additional assets. The grantor should either extend the term of the trust for an additional ten years at the time the new assets are added, or he should create a separate ten-year trust.[19]

## SOME LIMITATIONS AND REQUIREMENTS

The primary purpose of a short-term trust is to put the trust income sufficiently beyond the grantor's control to insure that the income will not be considered his and be taxed to him. The grantor, therefore, may not retain such powers or controls that he will be considered as remaining, from a tax viewpoint, the substantial owner of the trust property.[20] He may not, for example, have the trust principal revert to him before the expiration of the ten years, unless the beneficiary's death should terminate the trust earlier. The grantor may not have the use or benefit of the trust income, whether it is payable to him currently or accumulated later for his future enjoyment.[21] He may not revoke the trust during the ten-year period or change the provisions of the trust instrument after it has been executed.[22]

The grantor may not have the right to borrow from the trust without completely repaying the loan and interest before the beginning of the next taxable year. An exception is made where the loan provides for adequate interest and adequate security and was made by a trustee other than the grantor or a related or subordinate trustee who is subservient to him.[23]

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[18]Reg. § 1.673 (d)-1; 1 CCH FEDERAL TAX GUIDE, ¶ 1734 (1960).

[19]Grotheer, *supra* note 11.

[20]Schuyler, *Short-Term Trusts—A Positive Approach to a Law Full of Negatives*, 36 TRUST BULL. 21 (1957).

[21]Reg. § 1.673 (a)-1 (a); Reg. § 1.677 (a)-1 (b). See also 1 CCH FEDERAL TAX GUIDE, ¶1734 (1960).

[22]Reg. § 1.675-1 (a). See also MICHAELSON, INCOME TAXATION OF ESTATES AND TRUSTS 52-54 (rev. ed. 1959); 1 CCH FEDERAL TAX GUIDE, ¶ 1731 (1960).

[23]Reg. § 1.675-1 (b) (2), (3).

## THE GRANTOR AS TRUSTEE

The grantor himself may serve as trustee. If the trust provides simply for current distribution of income to a designated beneficiary or directs that the income be accumulated, no problem will arise, except in regard to certain administrative powers. The grantor as trustee may even exercise certain limited controls over the principal. As trustee he may vote stock held in the trust, control the investing and reinvesting of trust funds, and reacquire the trust principal by substituting other property of an equivalent value.[24]

But if the grantor as trustee wishes to exercise that discretion over principal and income which gives a trust desired flexibility, he immediately encounters difficulties. It is often advantageous, for instance, for a trustee to have "sprinkling" powers, which will allow the trustee to distribute the income and even the principal among a list or class of beneficiaries, changing the distribution as circumstances change. If the grantor acting as trustee has such powers, he is taxed on the income.[25] Of all the trustees allowable, the grantor is the most circumscribed and the most limited in authority.

Now if the grantor wishes the trustee to have those "sprinkling" powers so as to take care of future contingencies and emergencies, an independent trustee, such as a bank or an individual who is not related or subordinate to the grantor, must be selected. Along with the independent trustee the grantor's wife, father, mother, child, brother, sister or one of his employees may serve as a co-trustee, if it is desired, and this will not cause the trust income to be taxed to the grantor.[26]

## LIFE INSURANCE

Life Insurance can be used very effectively in connection with a short-term trust. If the trust has the grantor or a person related or subordinate to him as trustee, or even if there is an independent trustee, and trust income is used to pay insurance premiums on policies on the life of the grantor, the trust's income will be taxed to the grantor.[27] But premiums may be paid on policies on the lives of other persons without the grantor being so taxed.[28]

For instance, the insured may be a minor child. The trust may then pay the premiums and the grantor will not be taxed on the income. When the trust terminates, the trust principal returns to the grantor, and the policies can be turned over to the child or used for the child's education.[29]

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[24]Reg. § 1.675-1 (b) (4). See also Grotheer, *supra* note 11, at 2 9-30.

[25]I.R.C. § 674 (c); Reg. § 1.674 (c)-1.

[26]I.R.C. § 672 (c); Reg. § 1.672 (c)-1. See also Yohlin, *supra* note 6, at 57-58

[27]Reg. § 1.677 (a)-1 (b) (3).

[28]MICHAELSON, *supra* note 22, at 67.

[29]CASEY, *supra* note 1, at ¶ 16,926.3.

Through the medium of life insurance, a husband can insure against the loss of the benefits flowing from the marital deduction, which is allowed for federal estate tax purposes. If the wife survives her husband, and his estate is properly planned, the marital deduction will lower substantially the federal estate tax on property which will pass ultimately to their children. However, if the wife dies first, the marital deduction is lost. Assume, for illustration, that the loss of the marital deduction would increase the husband's estate tax by $75,000.00. Then, consequently, the value of the property that will ultimately pass to the children will be diminished by that sum. Now assume that the husband, as grantor, establishes a short-term trust and transfers to it property producing sufficient income to finance $75,000.00 of insurance on the wife's life, the policies being payable to their children. If the wife dies before the husband does, the shrinkage in the value of the property that is to pass finally to the children will be off-set by the insurance proceeds which the children receive from those policies.[30]

The practical uses to which a short-term trust, combined with life insurance, can be put are numerous and varied. Such trusts and life insurance policies work well together.

## THE PROPERTY PLACED IN TRUST

Not every kind of property may be put in a short-term trust as all, or a part, of its principal. The grantor, of course, may put money, stocks, bonds, promissory notes, rental property and many other kinds of property in such a trust. But he is not permitted to place an interest in a family partnership in the trust.[31]

If the grantor puts mortgaged property in as principal, and any of the trust income is used to pay the mortgage principal and interest, the grantor is taxed on the income so used.[32]

The grantor may not place property in trust and lease it back to himself. Such transfer and leaseback arrangements are not permitted without income tax consequences to the grantor.[33]

It is not sufficient to assign a right to future income to the trust. The grantor is required to transfer property to it.[34]

## GIFT AND ESTATE TAXES

When a person creates a short-term trust and transfers property to it, there may be a gift tax involved. The grantor is making a gift of the income from the property to the beneficiary for the term of the

[30] CASEY, *supra* note 1, at ¶ 16,926.8.

[31] I.R.C. § 704 (e); Reg. § 1.671-1 (c).

[32] 1 CCH FEDERAL TAX GUIDE, ¶ 1730. See also Grotheer, *supra* note 11, at 29.

[33] Reg. § 1.671-1 (c). See also Grotheer, *supra* note 11, at 29.

[34] Reg. § 1.671-1 (c).

trust. The gift of income from a ten-year trust, according to tables supplied by the Treasury Department,[35] is valued at about 29.10% of the amount of the principal. If $100,000.00 of principal is placed in a trust, the value of the gift of income from it for a ten-year period amounts to $29,100.00. An individual has, of course, a $30,000.00 specific exemption for gift tax purposes and, if this has not been exhausted, it can be used to prevent or minimize any gift tax that may be incurred.[36]

If the trust instrument provides that the income must be distributed to the beneficiary, the $3,000.00 annual exclusion will apply. If the income may be accumulated, the $3,000.00 annual exclusion cannot be claimed.[37] When husband and wife join in making the transfer in trust, specific exemptions of $60,000.00 will be available and, in case the trust income must be distributed, annual exclusions of $6,000.00 can be claimed.[38]

If a short-term trust is established for the benefit of a minor, may the grantor claim the $3,000.00 annual exclusion when the transfer in trust is made? The answer is in the negative. In a trust for a minor's benefit, the annual exclusion will apply even though the income is to be accumulated, provided the principal and income may be expended by or for the benefit of the beneficiary before he becomes twenty-one years of age, and any part not so expended will pass to him when he becomes twenty-one years of age and, if he dies before attaining that age, will be payable to his estate or as he may appoint under a general power of appointment.[39] Since a short-term trust instrument is designed to return the trust principal to the grantor at the trust's termination, naturally the trust principal will not pass to the minor when he becomes twenty-one years old, or to his estate if he dies before that time.

As a rule, when a person makes a gift to his spouse, the value of the gift is reduced by one-half due to the marital deduction provisions of the gift tax law. But if a short-term trust is created for the spouse, with provision that the principal is to revert to the grantor at the trust's termination, the gift is considered to be of a terminable interest. Consequently the total value of such gift would have to be taken into account for gift tax purposes.[40]

What is the estate tax situation of the grantor if he should die during the period of the short-term trust? He has a right to have the trust principal return to him at the trust's end, and this reversionary interest has a value[41] which must be included in his taxable estate. If the

[35] CASEY, *supra* note 1 at ¶ 15, 405.3.
[36] I.R.C. § 2521.
[37] I.R.C. § 2503 (b).
[38] I.R.C. § 2513 (a).
[39] I.R.C. § 2503 (c).
[40] I.R.C. § 2523 (b).
[41] CASEY, *supra* note 1, at ¶ 15,405.3.

grantor should die within a year of the creation of a trust having a principal of $100,000.00, for example only about 70.89% of the value of the principal, or approximately $70,890.00, would be included in his estate. It is possible, therefore, that the grantor may pay less estate taxes if he dies during the trust term.

As has been stated previously, if a grantor has a life expectancy of ten years or more, the trust may be made to terminate at his death, if he dies before the fixed period of the short-term trust ends. But if he does die before the fixed term is concluded, the entire trust principal, rather than a lower reversionary interest value, is taxable in his estate. He can, if he wishes, provide that in case of his premature death, the trust shall continue for its full fixed term for the benefit of his wife, and at its termination pass as he shall direct in his will. In that event, his estate will pay estate taxes only on the value of the reversionary interest determined at the time of his death.

From time to time the trustee realizes capital gains on the sale of assets of the estate, and such gains are ordinarily taxed to the grantor for the reason that the gains will be added to the original principal when it reverts to the grantor.[42] If he wishes to avoid being taxed on the capital gains, the trust instrument can specify that such gains are to be treated as part of the trust income, to be taxed to the beneficiary if distributed, or to the trust if accumulated.

## THE THROWBACK RULES

Brief mention should be made of the complicated five-year throwback rules as they may affect short-term trusts. These rules, simply stated, are designed to shift the income tax burden on trust income to the beneficiary when the trust accumulates income during the period of a few years and then distributes it. In such case, with a few designated exceptions, the income distributions are treated the same as if they had been made in the previous years. Provision is made for a five-year throwback. The income taxes of the beneficiary, who is often in the very high tax brackets, and the trust, which is usually in much lower brackets, are recomputed. The beneficiary, after being allowed a credit for the taxes paid by the trust in those earlier years, is charged with additional income tax resulting from the recomputation.[43]

The existence of the throwback rules should not prevent the trustee of a short-term trust from being given power to accumulate trust income, if that is desired. Among the designated exceptions to those rules is one relating to trusts which permit final distributions, including accumulated

[42] I.R.C. § 677 (a) (2).

[43] I.R.C. §§ 665-668. See also MICHAELSON, *supra* note 22, at 20-26; Sutter, *Selected Areas for Simplification of Income Taxation of Estates and Trusts*, 98 TRUSTS AND ESTATES 967, 968.

income, if the trust terminates at least nine years after the last transfer of property to it. Trust income accumulations for minors, payable when a minor becomes twenty-one years old, are also excepted. Payments to meet the emergency needs of a beneficiary are likewise excepted. Also, in addition to paying out current income, the trustee may distribute accumulated income in any year, if it does not exceed $2,000.00 in amount, without having the throwback rules apply.[44]

## CONCLUSION

The short-term trust offers a medium of income tax saving which, in some cases, can be spectacular. However, a person should not let that possibility cause him to create such a trust until he has first reviewed carefully his own situation and that of his family. He must himself be in relatively high income tax brackets and he must own income-producing assets which he feels he can part with for at least ten years. His family must be able to live without the income from those assets in case of his death or disability before the trust term ends.

If a person, after considering these factors, finds that a short-term trust can be of decided advantage in his case, he should have a competent attorney, who is versed in tax and trust law, prepare the trust instrument.

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[44]CASEY, *supra* note 1, at ¶ 16,914.2.

# STATE TAXATION

*John E. Stone**

Up until about the time of the depression state taxation proceeded almost entirely upon the ad valorem levy with a comparatively small amount of revenue from fees and licenses. Today, I suppose all the states would be hopelessly bankrupt if they were forced to depend entirly upon ad valorem taxes to finance their operations. State taxes are now multitudinous and more are being devised with practically each session of the various state legislatures. When the states first departed from the theory that they could finance their operations almost entirely from the ad valorem levy and sought other means of imposing taxes the reaction of the taxpayer usually took one of two extreme positions; the first and most prevalent was, "It's the law. I don't know much about it and since it really does not amount to much I will take the tax collector's word for what I owe and let it go at that." The other reaction was both more extreme and more violent and consisted not only of refusing to pay the tax but also of defying the tax collector and denying him access—not only to the books of the business, but even to the taxpayer's premises.

With the passage of time both attitudes have changed. No longer does one blindly pay taxes of any kind. Many corporations have whole departments devoted exclusively to the handling of their state tax matters, and well they might, for what started as a small stipend has grown in many instances into sizeable amounts. On the other hand the defiers have passed almost entirely from the scene, with the various bureaus of the federal and state governments examining the books of every business. The business-man who stood on his rights of business privacy has long since had all resistance trampled out of him.

The first big road leading from the ad valorem theory towards solvency for the state was blazed by the sales tax law and as a revenue producer it was an immediate success. It is today far and away the biggest revenue producer for those states that employ it. Many cities, both in states which do and which do not have state sales tax, have adopted city sales taxes. In Mississippi, the city sales taxes are administered by the State Tax Commission,[1] which also collects the state sales tax. The general state rate is three per cent[2] and the city rate is one-half of one per cent.[3]

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†An address delivered to a meeting of L.P.G. Tank Fabricators in Dallas, Texas on January 4, 1960.

*Attorney for Mississippi State Tax Commission.

[1]Miss. Code Ann. § 10111.5 (d) (Supp. 1958).

[2]Miss. Code Ann. § 10108 (Supp. 1958).

[3]Miss. Code Ann. § 10111.5 (b) (Supp. 1958).

Of course, the incidence of a sales tax, that is, the event upon which the tax is levied, depends entirely upon the statutes of the various states. It may be placed either on the wholesale or retail level and it may also be placed upon either the purchaser or the seller. When placed on the seller, the law frequently requires him to pass it on to the purchaser and specifically forbids his absorbing the tax.[4]

One may wonder if the purchaser has to pay, what difference does it make upon whom the tax is placed. Well, just for example, the states cannot place a tax on an agency of the federal government so when the state lays the tax upon the purchaser the agency of the federal government does not have to pay the tax, but when the same tax is placed on the seller who must pass it on to the purchaser in increased price, then the agency of the federal government must pay.[5] If perchance, as happens rather infrequently the federal agency for whom a contractor is doing the work, constitutes the contractor its agent for the purchase of materials, then the sales tax cannot be charged, for this would be taxing the federal government which the states may not do.[6]

A contractor on the federal project must pay sales tax to the state in which the work is being done and the tax collecting agency of the state is given specific authority to enter upon the federal premises and seize the property of a delinquent taxpayer.[7]

Each sales tax act contains its own definition of a sale, which is usually sufficiently comprehensive to cover every transaction whereby title is passed from one person to another, including both[8] an exchange of property as well as a sale for money or other consideration. Many states have also expanded the definition to include the passing of title by the redemption of trading stamps. In some states occasional sales are exempt and in all states with a rural economy all agricultural products are exempt—sometimes even into the processing stage.

In Mississippi, as in some other states, there appears in the Sales Tax Act a levy of a certain percentage on income from various types of work carried on within the state. Really it is a mis-nomer for such statutes to be called "Sales Tax Acts" for they are in fact "Gross Income Taxes."[9] Here again much depends upon the wording of the act in the particular state.

Frequently the rate is not uniform, varying from one type of operation to another. For example in Mississippi the gross income tax

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[4]MISS. CODE ANN. § 10117 (Supp. 1958).

[5]Federal Reserve Bank of Chicago v. Department of the State of Michigan, 339 Mich 587, 64 N.W.2d 639 (1954).

[6]Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954).

[7]4 U.S.C. 105 (1958).

[8]MISS. CODE ANN. § 10104 (1-b) (6) (Supp. 1958).

[9]MISS. CODE ANN. § 10110 (Supp. 1958); MISS. CODE ANN. § 10111 (Supp. 1958).

on cotton gins is fifteen cents per bale ginned, three per cent on plumbing or pipe fitting, but if the plumber or pipe fitter qualifies as a contractor his tax is cut in half. By qualifying as a contractor, we mean that the tax-payer shall have entered into a contract to perform work within the state, the compensation therefor shall exceed $10,000.00 and he shall either have paid all of his sales and use tax before entering upon the work or shall have given a bond therefor.

Under a gross income tax statute a state may only tax that work which is performed in the state; therefore, if part of the work is performed in another state and is not readily separable from that performed within the taxing state, before it can be taxed, the state seeking to have the work taxed must promulgate rules for apportioning to the taxing state only the receipts from work performed therein.[10]

Shortly after the enactments of the first Sales Tax Act the merchants along the border of the taxing state realized that many of their customers were crossing the line and trading in the non-taxing state, thus circumventing the tax and forcing their former vendors into bankruptcy. For the purpose of rectifying this situation the states began to pass what has come to be known as Use Tax Statutes—sometimes called Compensating Tax.[11]

In Mississippi the statute states: "There is hereby levied, assessed and shall be collected from every person in this state a tax or excise for the privilege of using, storing or consuming within this State, as a consumer, any tangible personal property, either purchased at retail, acquired by gift, extracted, manufactured, leased or rented by said person. This tax shall apply to the use of every article or substance of tangible personal property, including that acquired at a casual or isolated sale and including by-products used by the manufacturer thereof, and property withdrawn from stock for consumption by a user within this state and the tax shall apply to persons receiving benefits from the services of cleaning, pressing, dying or laundering."[12]

The statute not only places a tax upon property purchased in one state and brought into the taxing state for consumption but also taxes all property stored, used or consumed within the taxing state whether purchased, acquired by gift, leased or rented.[13]

If perchance a contractor has a contract to perform in Mississippi he will owe use tax on the equipment brought into the state for the purpose of performing this contract and this is true regardless of whether

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[10]Freeman v. Hewit, 329 U.S. 249 (1946). *But see* Monaghan v. Seismograph Service Corp., 108 So. 2d 721 (Miss. 1959) was held that the taxpayer was under a duty to segregate charges on its records.

[11]Miss. Code Ann. §§ 10146-01 through 10146-16 (Supp. 1958).

[12]Miss. Code Ann. § 10146-03 (Supp. 1958).

[13]Miss. Code Ann. §§ 10146-03 (a) and 10111 (Supp. 1958).

he owns or leases the equipment. The Use Tax is not a recurring tax and once paid on a particular piece of property is not due again no matter how many times it is moved in and out of the state. The Use Tax rates are the same as those of the sales tax and in the case of one bringing machinery and other equipment into Mississippi for the performance of a contract his use tax would be computed on the value of the equipment if owned and the rental, if leased, using the sales tax rate.

Under the statutes of Mississippi, although a municipality may levy a one-half cent sales tax, there is no authority for a municipality to levy a use tax.

Enforcement of the provisions of the use tax statutes have plagued taxing officials ever since these statutes have been enacted. There is no problem involved with contractors who bring lots of heavy equipment into the state, which may be seized for the tax, but the individual citizen who gets in his car and crosses the state line making his purchase there and returning to his domicile is for all practical purposes homefree.[14] Liability for payment of the use tax is placed upon both the seller and purchaser,[15] but as you can well imagine if the tax is not collected by the seller the individual purchaser does not trouble himself about the matter. If the purchase is a cash transaction the chances of the taxing authorities finding out about it are practically nil. The states have resorted to many devices in order to trap such persons—mostly to no avail.

If a corporation—such as a mail order house—has stores in the taxing state or is otherwise qualified to do business there, then the taxing state may require the mail order house to collect and remit use tax on mail orders to be filled by shipment into the state, even though the orders did not originate in its state.[16] If on the other hand there is a big retail store located near the state line of the taxing state which advertises so that the citizens of the taxing state may be induced to trade there and even make deliveries into the taxing state in its own equipment it cannot be forced to collect use tax for the taxing state, since it is not doing business there and the taxing state has no hold upon it. In such a situation the taxing state has no jurisdiction over the seller and, therefore, can force it to do nothing.[17] The whole issue revolves around the question of whether the seller is doing business in the taxing

[14]No use tax is due in this state when a sales tax of at least the same amount as our sales tax is paid to the state where the purchase is made. This exemption does not apply in the case of motor vehicles. MISS. CODE ANN. § 10146-04 (a) (Supp. 1958).

[15]MISS. CODE ANN. §§ 10146-06, 10146-08 (Supp. 1958).

[16]Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941); People of the State of California v. West Publishing Co., 34 Cal. 2d 822, 216 P.2d 441 (1950).

[17]Miller Bros. v. Maryland, 347 U.S. 340 (1954).

state. If it is, the taxing state can force it to collect and remit use tax; if not, the taxing state is powerless in this respect.

Under the old conventional idea of "doing business", a corporation had to become domesticated or qualified with the Secretary of State or some other official of the state before it was considered as either doing business or qualified to do business in a state. This definition is no longer dependable for most tax statutes carry their own definition of "doing business," and so long as these do not violate the terms of the Constitution of the United States they control.

If the out-of-state vendor sends salesmen regularly into the taxing state and makes deliveries in its own equipment, a very serious question would be raised as to whether it could continue to refuse to collect use tax.

However, voluntary cooperation of business in the collection of use tax in many instances where sanctions could not possibly be enforced has been most gratifying to the taxing authorities.

If you are not doing business in a state and you agree to collect and remit use taxes, you do it merely as an accomodation to the taxing state. There is no law which requires you to do so nor, so far as I know, is there any law which would prevent your withdrawal from the agreement.

Interstate commerce is subject to regulation by the Congress of the United States alone and although up until recently the federal government had not entered the field of state taxation, as it affects interstate commerce the courts, and especially the Supreme Court of the United States, have struggled with the question since the Constitution was first put in operation. So far as interstate commerce and the use tax are concerned, it may be noted that the use tax comes into play only after interstate transportation has ceased.[18]

For the purpose of illustration, we had in Mississippi a case where an engine for a shrimp boat was sent from without the state to the side of the wharf where the boat was docked and removed as fast as possible from the railroad car and installed in the shrimp boat which did its shrimping beyond the continental limits of the United States. The court said that there was at least a moment when it came to rest in the state and, therefore, the tax attached. This holding was in keeping with a California case affirmed by the Supreme Court of the United States in regard to railroad equipment.

To reiterate, in Mississippi, sales and installations to consumers, except manufacturers, carry a three per cent sales tax and if in a city which has a city sales tax an additional one-half of one per cent. Sales to

[18]Southern Pac. Co. v. Gallagher, 306 U.S. 167 (1939); Mavar Shrimp & Oyster Co., Ltd. v. Stone, 221 Miss. 519, 73 So. 2d 109 (1954).

retailers for resale carry one-eighth of one per cent.[19]

A prime contractor who contracts to erect a tank, the total charges amounting to more than $10,000.00, must pay a gross income tax of one and one-half per cent thereon plus a privilege tax of fifty cents per thousand.[20]

Sales to manufacturers for use as manufacturing machinery are exempt when the amount of the sale as shown on the invoice exceeds $500.00.[21] Examples are tanks sold to refineries, paper mills and other manufacturers handling liquids or gases where tanks are being used to blend, mix or age products being manufactured for sale. When the selling price of manufacturing tanks is $500.00 or less, the sales or use tax of three per cent applies. Repairs to tanks are taxable at the rate of three or three and one-half per cent depending upon whether the repairs are made in a city having a city sales tax or not.

State income taxation, like federal income taxation, is based on the net rather than the gross income of the taxpayer;[22] but, of course, the big difference is that in federal income taxation neither the government nor the taxpayer has to worry about state lines, which in state income taxation are a constant concern. As heretofore stated, there is always present the question of whether the taxpayer is actually doing business in the taxing state. If so, it is liable; if not, of course, it is not liable. Then too there is the question of whether the particular tax is one levied against interstate commerce itself. A state may not tax the privilege of engaging in interstate commerce,[23] yet the Supreme Court of the United States has stated on several occasions that "interstate commerce may be made to pay its way."[24] Frequently in all branches of the law and particularly in the field of state taxation, the question of validity is decided not so much on what the taxing authorities, either legislative or administrative, have done, as upon how they have done it. It should always be kept in mind that a state has authority only to tax the income earned within that state and may not tax income earned in another state. The exception, though, is that a state may tax the income of its citizens, human or corporate, wherever it is earned.[25] In order to get around the inequity of double taxation, though, most states of the taxpayer's domicile allow a deduction of income taxes paid to other states.[26]

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[19]MISS. CODE ANN. §§10108, 10147-03 (Supp. 1958).

[20]MISS. CODE ANN. § 9484 (Supp. 1958).

[21]MISS. CODE ANN. § 10116 (a) (3) (Supp. 1958).

[22]United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918); Knox v. Gulf M. & N. R. Co., 138 Miss. 70, 104 So. 689 (1925).

[23]Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101 (1944).

[24]Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938).

[25]Lawrence v. State Tax Comm. of Miss., 286 U.S. 276 (1932).

[26]Miss. Income Tax Regulations No. 12, art. 107.

So far as state income taxation is concerned, there are two main divisions of business. One is a "separable business," which is subject to direct accounting.[27] Direct accounting so far as state taxation is concerned is the employment of accounting procedures which will indicate with reasonable accuracy just how much income a business enterprise has earned within a particular state. The second form of business endeavor known to state taxation is a "unitary business" whose activities from its very nature are so closely related as to make ascertainment of income earned in each state where activities are carried on almost impossible. The essential test as to whether a business is a unitary one is whether the operation of the portion of the business within the state is dependent upon or contributory to the operation of the business outside the state.[28] If there is such a relationship, the business is unitary. If there is no such relationship, then the business may be considered separate and the income therefrom may be determined without reference to the success or failure of the taxpayer's activities outside the state. There is a third form of business activity recognized by a few states—that is, the multi-form business, which means that where a portion of a very large business establishment operates independently of the other phases of the business and thus may be divorced entirely therefrom, this branch of the business for income tax purposes is treated as a separate business entirely.

There is no problem involved in taxing those businesses susceptible of direct or separate accounting since this method assigns with reasonable accuracy the net income earned in the taxing state. Since a unitary business from its very nature is not susceptible of such determination another method had to be devised so that for income taxing purposes, a taxing state might assign to itself that portion of the unitary income earned therein.

In order to meet this need there was devised what is known as an allocation formula. This formula is made up of one or more factors which go toward the production of income of the taxpayer. For example, in the case of a pipe line it might be based on the number of miles of the line within the state or in the case of a bus line the number of miles traveled in the state. Most frequently, though, the formula is made up of three factors: wages, sales and property as these factors in the state relate to the same factors wheresoever located. The fraction which is thus obtained is divided into the total gross income of the taxpayer in order to obtain the total gross income assignable to the taxing state.

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[27]McWilliams Dredging Co. v. McKeigney, 227 Miss. 730, 86 So. 2d 672, *app. dismissed,* 352 U.S. 807 (1956).

[28]Miss. State Tax Comm. v. Tenn. Gas Transmission Co., 116 So.2d 550 (Miss. 1959).

Theoretically only one hundred per cent of the taxpayer's net income may be assigned for income tax purposes,[29] but with many states taking a bite by the use of many and varied formulas it sometimes happens that more than one hundred per cent of the taxpayer's income is taxed. The courts have been very lenient with the taxing authorities in this regard and have held that the burden of proof is on the taxpayer in attacking an apportionment formula to show by clear and cogent evidence that the formula taxes extraterritorial income.[30] They have also held that the taxing authorities are not held to mathematical exactitude in this matter.[31]

Because of the many and varied allocation formulas which may be applied to a large and multi-state corporation, there has been some agitation for the Congress to adopt a national formula and this may be done within the next few years.

All of this does not mean that the taxpayer has no chance in the courts. The factors employed in the formula must bear some relation to the taxpayer's income producing elements.[32] If the taxpayer can show, as some have done, that the income assigned to the taxing state is out of proportion to the income actually earned in the state, the formula is invalid. An apportionment formula which is valid as to one business may be invalid as to another, depending on the results obtained from its actual operation. The criterion is the manner in which the formula affects the particular business sought to be taxed.[33]

Within the past twelve months more public attention has been focused upon the question of state income taxation than has taken place probably since the states have begun to utilize this form of revenue. This all grows out of an opinion of the Supreme Court of the United States delivered in February 1959, which consolidated two cases—one from Minnesota and the other from Georgia.[34] The Minnesota case involved the question of whether a foreign corporation was liable for income tax in the state of Minnesota when all the activities performed within that state were exclusively in furtherance of interstate commerce. The taxpayer's activities in Minnesota consisted of a regular and systematic course of solicitation of orders for sale of its products, each order being sent for acceptance to the company's offices in Mason City, Iowa. Orders were taken only from a list of particular dealers in

[29]Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

[30]Butler Bros. v. McColgan, 315 U.S. 501 (1942); Stapling Machines Co. v. Monaghan, 232 Miss. 484, 99 So.2d 649 (1958); McWilliams Dredging Co. v. McKeigney, 227 Miss. 730, 86 So.2d 672, *app. dismissed*, 352 U.S. 807 (1956).

[31]Mullaney v. Anderson, 342 U.S. 415 (1952); Illinois Central R.R. Co. v. Minnesota, 309 U.S. 157 (1940).

[32]State of Georgia v. Coca Cola Bottling Co., 212 Ga. 630, 94 S.E.2d 708 (1956).

[33]Hans Rees' Sons, Inc. v. North Carolina *ex. rel.* Maxwell, 283 U.S. 123 (1931).

[34]Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

Minnesota. Forty-eight per cent of the taxpayer's entire sales were made in this manner to dealers in Minnesota. For the efficient handling of its business activities in Minnesota the taxpayers leased a sales office, equipped with its own furniture and fixtures and placed it under the supervision of a District Manager. Two salesmen, including this District Manager, and a secretary occupied this three-room office. Two additional salesmen used it as a clearing house.

The Georgia case involved an income tax assessment against a Delaware corporation which had its principal office and plant in Birmingham, Alabama, where it manufactured and sold valves and pipe fittings. The taxpayer encouraged dealers in Georgia to carry an inventory of its products. It maintained no warehouse or storage facilities in Georgia; it did maintain a sales service office in Atlanta, which served five states. This office was headquarters for one salesman, who devoted about one-third of his time to the solicitation of orders in Georgia, and a full-time woman secretary. All orders taken were subject to approval in Birmingham.

The Supreme Court of the United States held that in both of these instances the corporations were doing business in the taxing states and, therefore, owed income taxes. Very shortly after these decisions, the Supreme Court refused to take jurisdiction of a case appealed from the state of Louisiana, wherein the supreme court of that state had held a Kentucky distiller and packager of whiskey liable for income taxes in Louisiana when the only activity carried on in that state was interstate commerce—upon orders submitted by its customers in Louisiana to its representatives who transmitted the orders to Louisville, Kentucky, where they were considered, approved or rejected. The taxpayer maintained neither a warehouse nor stock of goods in Louisiana and its activities were limited to the presence of what it called "missionary men," who called upon wholesale dealers and on occasions accompanied salesmen of these wholesalers to assist them in obtaining a suitable display of the taxpayer's merchandise in the business establishments of the retailers. It is interesting to note that these so-called "missionary men" neither solicited nor accepted orders from the retail dealers.[35]

The business men, particularly those engaged in the so-called small business field, became very alarmed because of the above decision and caused the Congress of the United States to hold hearings thereon, which hearings culminated in the passage of what is known as Public Law 86-272, which was signed by the President of the United States on September 14, 1959. This law imposes what is known as minimum standards and provides that no state shall have power to impose, after the date of the enactment of the statute, a net income tax on the income

[35]Brown-Forman Distillers Corp. v. Collector of Revenue, 359 U. S. 28 (1959).

derived within such state by any person from interstate commerce if the only business activities within such state by or on behalf of such person during such taxable year are either or both of the following: (1) the solicitation of orders by such person, or his representative, in such state for sale of tangible personal property, which orders are sent outside the state for approval or rejection, and, if approved are filled by shipment or delivery from a point outside the state; and (2) the solicitation of orders by such person, or his representative, in such state in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in number (1) above. There are exceptions applicable to any corporation which is incorporated under the laws of the taxing state or any individual who under the laws of such state is domiciled in or a resident of such state.

Also, under the terms of the act a person shall not be considered to have engaged in business activity within any state during any taxable year merely by reason of sales in such state or the solicitation of orders for sales therein of tangible personal property on behalf of such person by one or more independent contractors or by reason of the maintenance of an office in such state by one or more independent contractors, whose activities on behalf of such person in the state consist solely of making sales or soliciting orders for sales of tangible personal property. The independent contractor referred to in the statute means a commission agent, broker or independent contractor, who is engaged in selling or soliciting orders for the sale of tangible personal property for more than one person and who holds himself out as such in the regular course of his business activity. Also, the term representative does not include an independent contractor.

It should be kept in mind that the above statute is "stop gap" legislation only. It provides that Committees of the Congress shall make a full and complete study of all matters pertaining to taxation by states on income derived within the state from the conduct of business activities which are exclusively in furtherance of interstate commerce or which are a part of interstate commerce, for the purpose of recommending to the Congress proposed legislation providing uniform standards to be observed by the states in imposing income taxes so derived. This Committee shall report on or before July 1, 1962.

The effect of this legislation is to leave standing the decisions, at least for the present, regarding the income taxes in both the Georgia and Minnesota cases and to overrule the decision in regard to the income tax in the Louisiana case.

It will be noted that the above statute deals only with sales and not with services. When services are performed within the taxing state,

it is my opinion that the immunity of the statute is lost, and the immunity of the statute is likewise lost when the taxpayer is a domestic corporation or when it opens an office within the taxing state. It will also be noted that the sale of intangibles is entirely disregarded by the statute and presumably would be taxable.

Louisiana has publicly taken the position that it will, at the first opportunity, challenge the constitutionality of the above Congressional legislation.

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# Student Comment

## IS A COLLEGE EDUCATION NECESSARY?

"In the absence of a precedent among our own decisions, we hold that the minor child is worthy of and qualified for a college education and shows an aptitude, therefore it is the primary duty of the father if reasonably financially able to do so, to provide funds for the college education."[1] With these words Mississippi has joined the ranks of an enlightened minority of states which recognize the necessity of a college education and which, under certain circumstances, will allow their courts to provide for this necessity. This article will analyze those important cases which have been decided in the United States since the question first arose in 1844 and which have culminated in *Pass v. Pass*[2] in Mississippi.

Although the English courts were loath to follow it, Blackstone, more than two hundred years ago, stated the legal principle applicable to the issue under consideration:

> The last duty of parents to their children is that of giving them an education suitable to their station in life; a duty pointed out by reason, and of far the greatest importance of any . . . it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child by bringing him into the world, if he afterwards entirely neglects his culture and education, and suffers him to grow up like a beast, to lead a life useless to others and shameful to himself.[3]

This same principle has been stated by Schouler in a treatise:

> The second duty of parents is that of education: a duty which Blackstone pronounces to be far the greatest of all these in importance. This importance is enhanced by the consideration that the usefulness of each new member of the human family to society depends chiefly upon his character, as developed by the training he receives early in life. Not the increase in population, but the increase of a well-ordered, intelligent, and honorable population is to determine the strength of a State . . . . So intimately is government concerned in the results of early training, that it interferes, and justly, too, both to aid the parent in giving his children a good education, and in compelling that education, where the parent himself, and not the child, is delinquent in improving the opportunities offered.[4]

Thus is stated the public policy argument which prevails today.

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[1] Pass v. Pass, 118 So. 2d 769 (Miss. 1960).

[2] *Ibid.*

[3] 1 Blackstone's Commentaries 450 (Wendell's ed. 1854).

[4] 1 Schouler, Marriage, Divorce, Separation and Domestic Relations 845 (6th ed. 1921).

A review of American cases in the area of law under consideration must begin with *Middlebury College v. Chandler*,[5] a Vermont decision rendered in 1844. Almost without exception, later cases in this field have cited *Middlebury*. Those courts denying the necessity of a college education have sought to justify their positions by a reliance upon *Middlebury* while courts favoring the necessity of college education have gone to unnecessary lengths to distinguish *Middlebury*. It is the contention of this writer that those courts seeking to distinguish *Middlebury* would have done well to cite it in support instead, for *Middlebury* actually set up the two standards used by enlightened courts today. Unfortunately, portions of *Middlebury*, as is too frequently true, have been lifted from the opinion's text at the expense of an accurate understanding of the decision. Those cases relying on *Middlebury* as authority against the inclusion of a college education as a necessity invariably cite the following passage:

> . . . a good common school education, at the least, is now fully recognized as one of the necessaries for an infant . . . . But it is obvious that the more extensive attainments in literature and science must be viewed in a light somewhat different. Though they tend greatly to elevate and adorn personal character, are a source of much private enjoyment, and may be justly expected to prove of public utility, yet in reference to men in general they are far from being necessary in a legal sense. The mass of our citizens pass through life without them.[6]

Such a reading of the case ignores the highly significant sentence which follows: ". . . Now it does not appear that extraneous circumstances existed in the defendant's case, such as wealth, or station in society, or that he exhibited peculiar indications of genius or talent, which would suggest the fitness and expediency of a college education for him, more than for the generality of youth in the community."[7] It is submitted that this dictum presages the standards utilized today — the ability to pay and the aptitude of the child. This, coupled with the court's recognition of the relativity of the term "necessaries,"[8] would seem to be powerful support for the enlightened rule. Apparently only one court has grasped this aspect of the *Middlebury* decision. In *Jonitz v. Jonitz*,[9] a New Jersey court in 1953 remarked the significance of the quoted sentence and said further: "It is interesting to note that in the *Middlebury College* case the court recognized the term 'necessary' is a relative and flexible one and seemingly contemplated the expansion of educa-

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5 16 Vt. 683, 42 Am. Dec. 537 (1844).

6 *Ibid.*

7 *Ibid.*

8 *Ibid.*

9 25 N.J. Super. 544, 96 A.2d 782 (App. Div. 1953).

tional opportunities to the studious and qualified."[10] The *Jonitz* decision, a departure from precedent in New Jersey, is submitted as the outstanding case on the interpretation of the *Middlebury* decision as well as a generally well-reasoned opinion. The court in *Jonitz* seemed particularly influenced by dicta in *Cohen v. Cohen*,[12] a 1949 New Jersey case.

More than eighty years after the *Middlebury* case came the decision in *Esteb v. Esteb*.[13] In 1926 the Washington Supreme Court, although falling into the trap of attempting to distinguish *Middlebury* instead of citing *Middlebury* to advantage, nevertheless produced the most enlightened opinion yet rendered in the field:

> The rule in *Middlebury College v. Chandler*, supra, was clearly based upon conditions which existed at that time. An opportunity at that early date for a common school education was small, for a high school education less, and for a college education was almost impossible to the average family .... But conditions have changed greatly in almost a century that has elapsed since that time. Where the college graduate of that day was the exception, today such a person may almost be said to be the rule .... That it is the public policy of the state that a college education should be had, if possible, by all its citizens, is made manifest by the fact that the state of Washington maintains so many institutions of higher learning at public expense .... Our conclusion is that, since the mother has the custody of this child, knows its character and ability, she is in a position to determine what education it should have, what course should be pursued.[14]

It is pertinent to note that the factual situation in the *Esteb* case was similar to that in *Pass v. Pass*. This result has obtained in Washington since the *Esteb* decision.[15]

The most severe blow to an enlightened rule was struck in Indiana in 1930 in the decision of *Morris v. Morris*.[16] There the familiar situation existed in which the divorced father sought to be relieved of

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10 *Ibid.*

11 See, *e.g.*, Rosenthal v. Rosenthal, 19 N.J. Super. 521, 88 A.2d 655 (Ch. 1952); Ziesel v. Ziesel, 93 N.J. Eq. 153, 115 Atl. 435 (E. and A. 1921); Streitwolf v. Streitwolf, 58 N.J. Eq. 570, 43 Atl. 904 (E. and A. 1899); Snover v. Snover, 13 N.J. Eq. 261 (Ch. 1861); Amos v. Amos, 4 N.J. Eq. 171 (Ch. 1842).

12 6 N.J. Super. 26, 69 A.2d 752 (App. Div. 1949): ". . . On the other hand, in a family where a college education would seem normal, and where the child shows scholastic aptitude and one or the other of the parents is well able financially to pay the expense of such an education, we have no doubt the court could order the payment."

13 138 Wash. 174, 244 Pac. 264 (1926).

14 *Ibid.*

15 See Feek v. Feek, 187 Wash. 573, 60 P.2d 686 (1936); Underwood v. Underwood, 162 Wash. 204, 298 Pac. 318 (1931).

16 92 Ind. App. 65, 171 N.E. 386, 387 (1930).

payments inasmuch as the child had completed high school. The Indiana court allowed the relief, attempting unsuccessfully to distinguish *Esteb* on its "peculiar facts", saying of *Middlebury,* "We concur in that view." The importance of the *Morris* decision has been denied by at least one court charging "... that it was hurriedly written."[17] That charge was substantiated by pointing out the Indiana court's failure to discern that in *Middlebury* the infant, and not the father, was the defendant. It has already been noted that the *Morris* opinion cites only the portion of *Middlebury* sympathetic to the result reached, obviously ignoring the fuller implications.

In 1931 the New Hampshire Supreme Court in *Payette v. Payette*[18] affirmed an order denying a petition submitted by the father of a minor child in which the father sought relief from a provision of a divorce decree requiring him to pay for the support of his former wife and their son. The father contended that he could not be required to contribute to the maintenance of a son who, although able to support himself, had elected to pursue a college education. In rejecting the father's contention, the court said: "While there are decisions under the statutes of other jurisdictions which hold that a parent in divorce proceedings cannot be required to furnish support to a minor child who is attending college, the cases which reach a contrary conclusion appear to be more in accord with the liberal view which prevails in this state."[19]

The Illinois Supreme Court as early as 1902 went so far in *Hilliard v. Anderson*[20] as to hold the father liable for his daughter's education in a private boarding school rather than in a public school. In 1957 this liberality in Illinois extended the obligation of a parent of ample means to support a child incapable of self-support beyond the duty to provide not only care and the bare necessities but also a college education, where that appears desirable in order to better equip the child for adult life.[21] While there are no appellate cases in Pennsylvania wherein the facts have been held to justify an order of support for a child attending college, it is pertinent to note that in *In re Fusco's Estate*[22] a lower court held that a college education could and should be, in these times, classified as necessary and a necessity. The Alabama Supreme Court has spoken on the subject, but the pertinent issue has been passed over lightly, allowing support for a college education in the particular situation, but failing to review authorities in other jurisdictions.[23]

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[17]Jackman v. Short, 165 Or. 626, 109 P.2d 860 (1941).

[18]85 N.H. 297, 157 Atl. 531 (1931).

[19]*Ibid.*

[20]197 Ill. 549, 64 N.E. 326 (1902).

[21]Strom v. Strom, 142 N.E.2d 172 (Ill. 1957).

[22]20 Beaver 145, 8 Fiduciary 632 (Pa. Orphans' Ct. 1959).

[23]Wells v. Wells, 230 Ala. 430, 161 So. 794 (1935).

In New York no case on the point appears to have been decided by the highest court, but in *O'Brien v. Springer*[24] in 1951 a lower court said that "... the duty of a father includes that of providing a high school education, and in some instances, if special aptitude is shown, a college education."[25] Dicta similar to this appeared earlier in New York in *International Text-Book v. Connelly*[26] and *Halsted v. Halsted*.[27]

Up to this point the cases considered have been decided upon the common law interpretation of the term "necessary." The opinions cited have been at pains to point out the relativity of the term and the changing conditions which have enlarged the term to include higher education. There is another basis for reaching the same result, however, and that is through statutory interpretation.

The first case concerned with a statutory provision regulating the award of support money for a minor's higher education was *Luques v. Luques*,[28] a 1928 Maine decision. In the *Luques* case, by virtue of an agreement between the parties, the court had ordered the divorced husband to pay his wife $35 weekly for her support and that of their minor child who was in the custody of the wife. Some time after the entry of the decree the ex-wife filed a petition in which she stated that $35 weekly was not sufficient "to properly educate the minor child and fit her for a vocation in life, she having more than ordinary musical talents."[29] She prayed that the decree be amended so as to require payment of additional sums toward the expense of a musical education. The ex-husband, in turn, claimed that a musical education was not a necessary. The court said:

> Whether the expense of a musical training can be deemed a necessity at common law is not determinative of the power of the court under the divorce statute of this state to order a parent to contribute to the care and support of a minor child, a divorce having been decreed. Section 14, c. 65, R.S. 1916, authorizes the court granting a divorce to decree concerning the 'care, custody, and support' of any minor children.[30]

The court declared that care and support must be held to include, whenever the parent is financially able, vocational training provided the child has special talents. It is pertinent to note that the Maine statute is similar to the Mississippi statute most applicable.[31] In neither statute is "education" expressly provided for.

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[24] 202 Misc. 210, 107 N.Y.S.2d 631 (App. Div. 1951).

[25] *Ibid.*

[26] 206 N.Y. 188, 99 N.E. 722 (1912).

[27] 228 App. Div. 298, 239 N.Y. Supp. 422 (App. Div. 1930).

[28] 127 Me. 356, 143 Atl. 263 (Sup. Jud. Ct. 1928).

[29] *Ibid.*

[30] *Ibid.*

[31] Miss. Code Ann. § 2743 (1956).

In *Stoner v. Weiss*,[32] a 1924 Oklahoma case, the court sustained an order which amended a divorce decree and which required the father to pay $20 per month into a fund for the future educational use and benefit of his minor child. In doing so the court relied on a statute of Oklahoma authorizing divorce decrees to make provision for the "support and education of the minor children of the marriage."[33] It should be noted, however, that there was no express declaration that the fund might be used for a college education although such an inference would be reasonable. Montana adopted the enlightened rule with its *Refer v. Refer*[34] decision in 1936. However, it disposes somewhat summarily of the question, relying on Section 5790, Rev. Codes of Montana 1921.

The leading case, *Jackman v. Short*,[35] a 1941 Oregon decision provides a detailed analysis of pertinent cases in the field. Despite severe criticism in its own state[36] it is an extremely well-reasoned opinion. It must be noted, however, that here again is found the improper analysis of the *Middlebury* decision, with an attempt to distinguish the *Middlebury* case on the basis that it involved a suit against the infant rather than against the infant's father. The importance of the case, in addition to the excellent review of cases, lies in its recognition of the fact that the common law rule rendering a father liable for necessaries had been supplanted with an Oregon statutory provision, Section 6-915, Oregon Code 1930, which granted to the court entering a divorce decree the power "to set aside, alter or modify so much of the decree as may provide for the care and custody of minor children, or the nurture and/or education thereof." The court pointed out that "... generally the purpose of new statutes is to get rid of old ideas. Hence, it may be assumed that in passing that statute the legislature desired to supplant or make a change in the old liability."[37] The court relied heavily on the *Luques* decision, reasoning that since the Maine statute which did not expressly include "education" was held sufficient to authorize payments by the father for his child's college education, the Oregon statute, which did contain "education," certainly was sufficient to authorize such payments. The Oregon court considered such a holding in the best interests of enlightened public policy; in this respect as well as in others the *Pass* opinion has closely followed the *Jackman* opinion.

A California court has likewise approved the statutory solution of the issue:

That question [requiring a divorced father to send his minor

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[32] 96 Okla. 285, 222 Pac. 547 (1924).

[33] 12 OKLA. STAT. ANN. § 1277.

[34] 102 Mont. 121, 56 P.2d 750 (1936).

[35] Jackman v. Short, 165 Or. 626, 109 P.2d 860 (1941).

[36] 20 OR. L. REV. 377 (1941).

[37] Jackman v. Short, 165 Or. 626, 109 P.2d 860 (1941).

> child to college], in our opinion, is one for the trial court, under all the facts and circumstances, to weigh and determine, and if the trial court determines that it is for the best welfare of the minor child that he or she be sent to college, and that the father has the financial ability to do so, then, we believe that under section 138 of the Civil Code, the court has the power to require the father to provide the funds necessary for such college education during the minority of the child.[38]

The foregoing cases provide the background against which *Pass v. Pass* was decided. Besides heavy reliance upon many of the above cases, the Mississippi court has based its decision on two Mississippi statutes, MISS. CODE ANN. Section 2743 (1956)[39] and MISS. CODE ANN. Section 399 (1956).[40] The former section is found in the chapter entitled "Divorce and Alimony" while the latter is in the chapter on "Guardian and Ward." More specifically, the former section is entitled "Custody of children and alimony" while the latter section is entitled "Equal parental guardianship of minor children." This writer submits that the court would have done better to have relied entirely on section 2743 inasmuch as section 399 is completely inapplicable to the situation in the *Pass* case. It is apparent that the court has sought to bolster its authorities with section 399 because that section expressly provides for the "care, nurture, welfare and education" of the child whereas section 2743 provides more generally for the child's "care, custody, and maintenance." It is submitted that such use of section 399 ignores its context. On the other hand, section 2743 is designed for just such situations as that existing in the *Pass* case, and *Luques*[41] persuasively argues

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[38]Hale v. Hale, 55 Cal. App. 2d 879, 132 P.2d 67, 69 (Dist. Ct. App. 1942).

[39]MISS. CODE ANN. § 2743 (1956):

When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody and maintenance of the children of the marriage, and also touching the maintenance and alimony of the wife, or any allowance to be made to her, and may, if need be, require sureties for the payment of the sum so allowed; and the court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require. However, where proof shows that both parents have separate incomes or estates, the court may require that each parent contribute to the support and maintenance of the children of the marriage in proportion to the relative financial ability of each.

[40]MISS. CODE ANN. § 399 (1956):

The father and mother are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare and education, and the care and management of their estates. The father and mother shall have equal powers and rights, and neither parent has any right paramount to the right of the other concerning the custody of the minor or the control of the services or the earnings of such minor, or any other matter affecting the minor . . . .

[41]127 Me. 356, 143. Atl. 263 (Sup. Jud. Ct. 1928).

that education is embraced in the wording of a statute such as Mississippi's.

An examination of the *Pass* decision discloses conditions precedent to the father's liability other than his ability to pay and the child's aptitude for higher education. The first of these conditions requires the child to be unemancipated. Apparently the father contended his minor daughter had become emancipated as a result of being placed in the custody of her mother by court order. The court rejected this position as untenable.[42]

The second and third conditions arise under section 2743. The second condition requires evidence of a change in circumstances sufficient to warrant a new decree. In the *Pass* case the daughter's qualification and desire for entering college were held to constitute such a change in circumstances. The third condition requires evidence where both parents have separate incomes, that the mother is contributing as much to the support and maintenance of the child as her relative financial ability will allow. In the *Pass* case there was evidence of the mother's lack of ability to furnish more support.

The two conditions to be met under the enlightened rule of earlier cases have been previously discussed—financial ability of the parrent and aptitude of the child for higher education. The daughter's aptitude in the *Pass* case was shown by her outstanding scholastic record in high school and through her prominence in extra-curricular activities. While the father's financial ability was in question, both the lower court and the appellate court held there was sufficient evidence of his financial ability. This finding resulted from the father's ownership of a 283-acre farm, considerable livestock, chickens and a large boat, trailer and other equipment for hunting and fishing as well as a U. S. Navy pension of $246 monthly.

In conclusion, this writer would pose a hypothetical situation which might well arise in this state as a result of deferred payment of college expenses, a plan much in use throughout the United States today. In this hypothetical the parents of Student X live amicably together in comfortable financial circumstances. Student X, an unemancipated minor with an aptitude for higher education, has enrolled at a state institution of higher learning under a deferred payment plan. Student X is unable to meet his payments because his father refuses him the money. Under Mississippi tort law neither Student X nor his mother could sue the father.[43] The state institution sues the father of Student X. Under such circumstances would the Mississippi Supreme Court hold Student X's

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[42]67 C.J.S. *Parent and Child* § 86 (1950).

[43]Durham v. Durham, 227 Miss. 76, 85 So.2d 807 (1955); Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891).

college education a "necessary" for which the father would be liable?

It is submitted that upon the basis of precedent the father's liability must be denied, for in almost every case analyzed such liability has been conditioned upon the existence of a divorce or separate maintenance decree awarding custody of the minor child to the mother. This narrowly defined hypothetical has been posed in an attempt to show that logic demands an extension of this "enlightened" rule. The Mississippi Supreme Court, speaking through Justice Holmes, has cogently set out the necessity of higher education:

> ... we are living today in an age of keen competition. If the children of today who are to be the citizens of tomorrow are to take their rightful place in a complex order of society and government and discharge the duties of citizenship as well as meet with success and responsibilities devolving upon them in their relations with their fellow man, the church, the state and nation, it must be recognized that their parents owe them the duty to the extent of their financial capacity to provide them the training and education which will be of such benefit to them in the discharge of the responsibilities of citizenship. ... It is a duty which the parent not only owes to his child but to the state as well, since the stability of our government must depend upon a well-equipped, well-trained and well-educated citizenship.... The fact is that the importance of a college education is being more and more recognized in matters of commerce, society, government and all human relations and the college graduate is being more and more preferred over those who are not so fortunate.... No parent should subject his worthy child to this disadvantage if he has the financial capacity to avoid it.

Such language, based on public policy, would seem to indicate a broadening of the rule. This writer would approve such breadth so long as the parent's financial ability and the child's aptitude for higher education were carefully considered. And here it would seem that section 399 of the Mississippi Code would find its proper application. It must be borne in mind, however, that such a liberal rule would have little practical effect without a corresponding change in Mississippi tort law to allow the child to sue the parent directly.

*E. Roy Hunt*

# RECENT DECISIONS

CONSTITUTIONAL LAW — FREEDOM OF SPEECH AND PRESS — ORDINANCE PROHIBITING ANONYMOUS HANDBILLS UNCONSTITUTIONAL

Petitioner was convicted of violating a Los Angeles ordinance prohibiting distribution of anonymous handbills.[1] Petitioner alleged that the ordinance abridged his freedom of speech and press secured against state invasion by the Fourteenth Amendment of the Constitution. Both the Municipal Court and the Superior Court of the County of Los Angeles rejected petitioner's contentions, and the U.S. Supreme Court granted certiorari. HELD: Reversed. An ordinance, which prohibits the distribution of any and all anonymous handbills under any circumstances, is unconstitutional on its face as a violation of freedom of speech and press. *Talley v. California,* 80 Sup. Ct. 536 (1960).

The freedom of speech and press, secured by the First Amendment against abridgment by the federal government, is similarly protected by the due process clause of the Fourteenth Amendment against abridgment by state action,[2] including municipal ordinances adopted under state authority.[3] Generally, in cases involving ordinances regulating freedom of speech or press, the problem requires a compromise between the exercise of individual rights and liberties on the one hand and the use of state police power on the other. The line between speech unconditionally guaranteed and speech which may be legitimately regulated, suppressed, or punished is finely drawn. The right of free speech and press is not absolute and unlimited at all times and under all circumstances,[4] nor does it give immunity to every possible use of language.[5] It does not preclude punishment of those who abuse this freedom,[6] and does not imply the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedoms depend.[7] Most assuredly, freedom of speech and press does not convey the right to paralyze the means for effective protection of all the free-

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[1] LOS. ANGELES, CAL., MUNICIPAL CODE § 28.06:

> No person shall distribute any handbill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of the following:
>
> (a) The person who printed, wrote, compiled or manufactured the same.
>
> (b) The person who caused the same to be distributed; provided however, that in the case of a fictitious person or club, in addition to such fictitious name, the true names and addresses of the owners, managers or agents of the person sponsoring said handbill shall also appear thereon.

[2] See, *e. g.,* N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).

[3] Staub v. Baxley, 355 U.S. 313 (1958).

[4] See, *e. g.,* Feiner v. New York, 340 U.S. 315 (1951).

[5] "... the most stringent protection of free speech would not protect a man in shouting fire in a theater.... (Mr. Justice Holmes), Schenck v. United States, 249 U.S. 47 (1919).

[6] See, *e.g.,* Gitlow v. N.Y. 268 U.S. 652 (1925).

[7] See Toledo Newspaper Co. v. U.S., 247 U.S. 402 (1918).

doms secured by the Bill of Rights.[8] However, such limitations upon free expression must be appropriately related to the safety of the state,[9] because the infringement of constitutional rights of individuals violates the guarantee of due process where no appropriate state interest underlies the state action.[10] Accordingly, all-inclusive statutes prohibiting distribution on the street of any handbill without a license,[11] or granting local officials full discretionary power in issuing necessary permits for the dissemination of all types of literature,[12] have been held void. But, the Constitution imposes no restriction on the state's power to regulate purely commercial handbills regardless of content or identification.[13] Similarly, uninvited door-to-door canvassing may be completely proscribed in the interest of privacy.[14] A statute curtailing free speech may be void on its face, or it may be invalid in its application, though valid if applied to a different factual situation. Generally, a statute is void upon its face if it does not aim specifically at evils within the allowable areas of state control, but sweeps within its ambit other activities which ordinarily constitute an exercise of freedom of speech or press,[15] hence operating as an overhanging threat to free discussion.[16] Some statutes have been held void on their face when the language used was sufficiently vague and indefinite to permit punishment of the fair use of the right of free speech,[17] or where the sweeping and inexact terms disclose a threat to the existence of free expression.[18]

Although the principal decision appears to turn primarily on the unlimited scope of the phrase, ". . . any handbill in any place under any circumstances. . . ," the majority of justices concluded that the identification requirement in the ordinance tends to restrict freedom of distribution and thereby freedom of expression. On this right to remain anonymous, the Court has spoken many times—often with mixed results. There are occasions when anonymity may be safely disallowed in favor of more compelling reasons for disclosure.[19] However, where there are equally forceful reasons for maintaining anonymity, the Court has been

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[8]See, *e.g.*, Bridges v. California, 314 U.S. 252, 282 (1941) (dissenting opinion) (impartial trial).

[9]See Schneider v. State, 308 U.S. 147 (1939) (keeping streets clean or discouraging fraudulent solicitation does not justify state restraint on expression). *But cf.* Cantwell v. Connecticut, 310 U.S. 296 (1940).

[10]Sweezy v. New Hampshire, 354 U.S. 234, 254 (1957).

[11]Schneider v. State, 308 U.S. 147 (1939).

[12]Lovell v. City of Griffin, 303 U.S. 444 (1938).

[13]Valentine v. Chrestensen, 316 U.S. 52 (1942).

[14]Breard v. Alexandria, 341 U.S. 622 (1951).

[15]See Carlson v. California, 310 U.S. 106 (1940); Thornhill v. Alabama, 310 U.S. 106 (1940) (picketing).

[16]Bridges v. California, 314 U.S. 252 (1941).

[17]*E.g.*, Winters v. N.Y., 333 U.S. 507 (1948).

[18]*E.g.*, Carlson v. California, 310 U.S. 106 (1940).

[19]See Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1912) (newspapers using second class mails); U.S. v. Harris, 347 U.S. 612 (1954) (lobbyist in Congress). *E.g.*, KAN. GEN. STAT. ANN. § 25-1714 (1949) (corrupt practices acts outlawing distribution of anonymous publications with reference to political candidates).

quick to strike state statutes requiring identification.[20] In a strong dissenting opinion by Mr. Justice Clark, it was pointed out that the Los Angeles ordinance requires only responsibility in writing, and that until it was shown that an individual's rights were infringed upon by the application of such a requirement (Talley made no such showing), the ordinance should be declared valid.[21] Thus, even though valid reasons exist for requiring identification of persons responsible for publication and distribution of handbills, the Court has now gone far in restricting, if not forbidding, state action on this subject.

*Robert C. Travis*

CONSTITUTIONAL LAW — OFF-STREET PARKING PROVISION IN MUNICIPAL ZONING ORDINANCE VIOLATES DUE PROCESS

Property owners brought this action to test the validity of the Denver Zoning Ordinance[1] requiring off-street parking[2] in district B-6. The District Court of the City and County of Denver held those portions of the ordinance requiring off-street parking unconstitutional. HELD: Affirmed. Provisions of the ordinance requiring off-street parking facilities were unconstitutional as depriving landowners of the use of their land for business purposes without due process of law under the United States Constitution and the Colorado State Constitution. *City and County of Denver v. Denver Buick, Inc.*, 347 P.2d 919 (Colo. 1960).

The constitutionality of zoning statutes and ordinances was firmly established in 1926 when the Supreme Court held such legislation within the police power unless unreasonable or arbitrary.[3] The power to zone is vested in municipal corporations by a state enabling act which generally gives them a free hand.[4] However, the regulations must have substantial relation to health, safety, morals, comfort, convenience and general welfare of the community.[5] In any event there is a presumption of validity

[20]See Bates v. City of Little Rock, 80 Sup. Ct. 412 (1960); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) (N.A.A.C.P. not required to open its membership rolls since identification of its members would tend to expose them to economic reprisals, loss of employment, threats of physical coercion or other manifestations of public hostility).

[21]Talley v. California, 80 Sup. Ct. 536, 540 (1960) (dissenting opinion).

[1]DENVER, COLO., ORDINANCE art. 614, § 392 (1956).

[2]Off-street parking ordinances require property owners to devote certain amounts of their property to parking in order to accomodate the parking needs created by their use of the property.

[3]Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). See also Rex v. Cross, 5 Camp. 224, 170 Eng. Rep. 1362 (1912) (off-street parking conceived before the automobile in England).

[4]In Mississippi the state enabling act is similar to the one in Colorado, except that Mississippi does not create a zoning commission and organizes zoning on the municipal rather than the county basis. MISS. CODE ANN. §§ 3591 - 3595 (1956); COLO. REV. STAT. ANN. ch. 106, art. 2 (1953).

[5]BASSET, ZONING 54 (1940), see note 2.

which accompanies any zoning law.[6] Off-street parking is generally established and upheld under the same authority as zoning.[7]

Provision for off-street parking is generally recognized as the legal method for controlling street congestion caused by office buildings, super markets, theaters, churches and other places of assembly.[8] Use of the land is restricted by requiring the owner to provide parking facilities adequate for the activities of his own land so as to prevent him from imposing hardship on the public.[9] Several jurisdictions hold parking regulations of this type within the exercise of the police power and valid.[10] Still other cases uphold the principle of off-street parking requirements, but invalidate the specific ordinance on other grounds.[11] The majority in the present case held the Denver off-street parking provision unconstitutional per se, citing no primary authority in point.[12]

The Supreme Court of Colorado obviously desired to prohibit any

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[6]Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). For the Mississippi concurring view, see Ballard v. Smith, 234 Miss. 531, 107 So. 2d 580 (1958).

[7]2 RATHKOPF, ZONING AND PLANNING 397 (3d ed. 1956).

[8]RATHKOPF, *op. cit. supra* note 7; YOKLEY, ZONING LAW AND PRACTICE 176 (2d ed. 1953).

[9]See generally Ronda Realty Corp. v. Lawton, 414 Ill. 313, 111 N.E.2d 310 (1953). See State *ex rel.* Associated Land & Investment Corp. v. City of Lyndhurst, 168 Ohio Supp. 289, 154 N.E.2d 435 (1958).

[10]City of New Orleans v. Leeco, Inc., 226 La. Ann. 335, 76 So. 2d 387 (1954) (one parking place for every eight seats in a theater). *Accord,* Mirschel v. Weissenberger, 277 App. Div 1039, 100 N.Y.S.2d 452 (1950) (Suitable facilities for a restaurant); Fleishon v. Philadelphia Zoning Board of Adjustment, 359 Pa. 264, 59 A.2d 142 (1948). The following cases reach the same result with regard to church parking problems. Allendale Congregation of Jehovah's Witnesses v. Grosman, 30 N.J. 273, 152 A.2d 569 (1959) (one place for every three seats in a church); Appeal of Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit, 183 Pa. Super. 219, 130 A.2d 240 (1957), *appeal denied,* 355 U.S. 40 (1957) (churches not exempt from reasonable police power regulations by freedom of worship). See Titus St. Paul Property Owners Ass'n v. Board of Zoning Appeals, 205 Misc. 1083, 132 N.Y.S.2d 148 (1954). *But see,* church cases cited note 11 *infra.*

[11]State *ex rel.* Associated Land & Investment Corp. v. City of Lyndhurst, 168 Ohio St. 289, 154 N.E.2d 435 (1958). *Accord,* State *ex rel.* Tampa, Florida Co. of Jehovah's Witnesses, North Unit, Inc. v. City of Tampa, 48 So. 2d 78 (Fla. 1950) (no relation to public health, morals, safety or welfare when applied to a church); Ronda Realty Corp. v. Lawton, 414 Ill. App. 313, 111 N.E.2d 310 (1953) (no reasonable distinction between apartment houses and hotels and boarding houses in respect to parking requirements); Board of Zoning Appeals of Decatur, Ind. Co. of Jehovah's Witnesses, 233 Ind. App. 83, 117 N.E.2d 115 (1954) (benefit to public health and welfare must outweigh restriction on right of freedom of worship); Roselle v. Wright, 37 N.J. Super. 507, 117 A.2d 661 (1955) (unreasonable as applied to private storage garage); Property Owners Ass'n of Garden City Estates, Inc. v. Board of Zoning, 2 Misc. 28, 123 N.Y.S.2d 716 (1953); State of Ohio *ex rel.* Killen Realty Co. v. City of East Cleveland, 108 Ohio App. 99, 153 N.E.2d 177 (1958) (difference between zoning and traffic problems); Commonwealth v. Cieslak, 179 Pa. Super. 441, 115 A. 2d 418 (1955) (unreasonable when no available land).

[12]347 P.2d at 947 (dissenting opinion of Doyle, Justice).

further provisions for off-street parking since the present case could have been decided on other grounds[13] allowing the basic premise to stand. The majority makes no distinction between compelling an owner to dedicate his property for the use of the general public,[14] which would clearly be unconstitutional,[15] and requiring an owner to provide facilities for the parking needs generated by his use of the land,[16] which might otherwise create a public nuisance to others using the street.[17] Some 265 cities have enacted off-street parking ordinances to meet the ever increasing traffic congestion.[18] No other jurisdictions presently hold as Colorado,[19] which must now seek other remedies[20] for their parking problems. Few states are likely to place such limitations on the police power of municipalities when the opportunity affords itself.[21]

*Ben H. Stone*

CONSTITUTIONAL LAW — SUNDAY LAWS — THEIR EFFECT ON BUSINESS OPERATION

A Pennsylvania retail establishment, Two Guys from Harrison-Allentown, sought an injunction against a county district attorney to prevent enforcement of a 1959 amendment to the state's Sunday "blue laws," which prohibited the sale of specified articles on Sunday. HELD: The statute does not violate equal protection of the laws or the "establishment of religion" protection afforded by the Constitution. *Two Guys from Harrison-Allentown, Inc. v. McGinley,* 179 F. Supp. 944 (E.D. Pa. 1959).

Sunday legislation is not a new thing to our times; it has been said that Sunday laws originated in Rome when Constantine the Great passed

[13]The court might have decided the question of off-street parking by holding it invalid in the present case because it applies retroactively, 347 P.2d at 930, or it could have held that the particular ordinance in question was unconstitutional as being unreasonably discriminatory, 347 P.2d at 929, but it went a step further and invalidated off-street parking provisions in general, 347 P.2d at 923.

[14]See 347 P.2d at 926, "it would be quite as proper to argue that the city had the right under the guise of zoning to require dedication of private property for the street itself, if it were considered that a given street was generally inadequate to carry the traffic."

[15]Vernon Park Realty Co. v. Mount Vernon, 307 App. Div. 493, 121 N.E.2d 517 (1954); 68 HARV. L. REV. 1089 (1955).

[16]See generally cases in notes 10 and 11, *supra.*

[17]Allendale Congregation of Jehovah's Witnesses v. Grosman, 30 N.J. 273, 152 A.2d 569 (1959).

[18]YOKLEY, ZONING LAW AND PRACTICE 76 (2d ed. 1953).

[19]The Colorado Supreme Court has since denied hearing on another case in which the principles of off-street parking were involved and cited the reasoning in the Denver Buick case. City and County of Denver v. Redding-Miller, Inc., 347 P.2d 954 (Colo. 1960).

[20]See RHYNE, MUNICIPAL LAW, ch. 19 (1957) as to other methods of controlling traffic problems.

[21]For the state of the law on zoning in Mississippi see generally Palazzola v. City of Gulfport, 211 Miss. 737, 52 So. 2d 611 (1951); City of Jackson v. McPherson, 162 Miss. 164, 138 So. 604 (1932).

an edict requiring all inhabitants to rest on a particular day.[1] Sunday legislation passed on to England where the basis of some of our states' Sunday laws was established.[2] The early trend of legislation in the United States relied to some degree on religious bases for the enforcement of Sunday laws on the theory of common law recognition of the Lord's Day.[3] Religious foundation for Sunday laws gave way, and in recent times regulation has resulted from secular, rather than religious, considerations.[4] The existence of Sunday statutes and ordinances in nearly all states makes categorization of more than a few of the broad areas of regulation very difficult.[5] One of the broad areas covered by Sunday legislation is the regulation of labor, usually stated in general terms prohibiting secular work on Sunday.[6] These broad laws do not prohibit all types of labor; works of necessity or charity are usually exempted. These exemptions for works of necessity or charity have given flexibility to the enforcement of Sunday laws. State and local restrictions on business operations comprise another general area of Sunday legislation.[7] Finally, restrictions on amusements compose the other category of regulation imposed by statutes and ordinances. Specific types of amusements are usually not prohibited, but restrictions appear under a general provision prohibiting labor on Sunday.[8] The major objections to restrictions imposed by Sunday laws fall into three broad divisions: violation of the equal protection guarantees of the federal and state constitutions as discrimination against certain classes of businesses,[9] violation of "due process" provisions of state or federal constitutions,[10] and violation of constitutional guarantees of religious freedom.

The present case seems to fall into the area of Sunday legislation loosely defined as the regulation of business. Legislation in this area can be subdivided into those laws which regulate specific types of stores[11] and those which regulate the sale of specific types of commodities. The case

[1]See Richardson v. Goddard, 64 U.S. (23 How.) 28 (1859).

[2]See Rosenbaum v. State, 131 Ark. 251, 199 S.W. 388 (1917).

[3]See City of Harlan v. Scott, 290 Ky. 585, 162 S.W.2d 8 (1942); Strand Amusement Co. v. Commonwealth, 241 Ky. 48, 43 S.W.2d 321 (1931); Paramount-Richards Theatres v. City of Hattiesburg, 210 Miss. 271, 49 So. 2d 574 (1950); Graham v. State, 134 Tenn. 285, 183 S.W. 983 (1916).

[4]See Strand Amusement Co. v. Commonwealth, *supra* note 3; Arrigo v. City of Lincoln, 154 Neb. 537, 48 N.W.2d 643 (1951); Broadbent v. Gibson, 105 Utah 53, 140 P.2d 939 (1943).

[5]See Strand Amusement Co. v. Commonwealth, 241 Ky. 48, 43 S.W.2d 321 (1931).

[6]*E.g.*, Broad-Grace Arcade Corp. v. Bright, 48 F.2d 348 (E.D. Va.), *aff'd*, 284 U.S. 588 (1931).

[7]*E.g.*, State v. McGee, 237 N.C. 633 (1953).

[8]*E.g.*, Ex parte Axsom, 63 Tex. Crim. 627, 141 S.W. 793 (1911).

[9]See Taylor v. Pine Bluff, 226 Ark. 309, 289 S.W.2d 679 (1956); State v. Hurliman, 143 Conn. 502, 123 A.2d 767 (1956); State v. Towery, 239 N.C. 274, 79 S.E.2d 513, *appeal dismissed*, 347 U.S. 925 (1954); State v. Haase, 97 Ohio App. 377, 116 N.E.2d 224 (1953).

[10]See State v. Cranston, 59 Idaho 461, 85 P.2d 682 (1938); State v. Grabinski, 33 Wash.2d 603, 206 P.2d 1022 (1949).

[11]See Petit v. Minnesota, 177 U.S. 164 (1900); Hickinbotham v. Williams, 296 S.W.2d 897 (Ark. 1956); Komen v. St. Louis, 316 Mo. 9, 289 S.W. 838 (1926), Sunday

at hand falls within the subdivision of regulation of specific commodities.[12] It arose under a Pennsylvania statute making sales on Sunday of furniture, housewares, appliances and other specific articles punishable by fine. The objections to this statute, violation of freedom of religion and violation of equal protection of the laws, bear out the general opposition to Sunday laws. The contention that the statute violates the "establishment of religion" clause of the First Amendment was overthrown by relying on a 1951 New York case and the subsequent denial of appeal by the United States Supreme Court for lack of a federal question.[13] The other objection to the Pennsylvania statute, based on the equal protection clause, complains against the singling out of certain types of retail selling, while other types of commercial activity remain almost without prohibition. This objection was overturned by several recent cases dealing with Sunday laws which were upheld in the face of identical objections.[14]

This case fairly well exemplifies the statement that even though frequent attacks have been made on the validity of state Sunday laws they have generally been upheld.[15] It seems that even though a federal court has recently ruled against the Massachusetts "Lord's Day" statute,[16] the Federal District Court of Pennsylvania has chosen to follow the general trend upholding state Sunday laws. Although the Mississippi Supreme Court has not been confronted with a case exactly in line with the present case, it is not too difficult to predict how this court would hold. The trend in Mississippi has been toward sustaining state and local legislation regulating Sunday activities.[17] It appears certain that if the Sunday legislation is uniform and not arbitrary in its regulatory classifications, it will be upheld by the Mississippi court as a valid exercise of the police powers.

*John A. Crawford*

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laws regulating specific types of business establishments have included grocery stores, butcher shops, barber shops, and other enumerated businesses.

[12]See Gundaker Cent. Motors v. Gassert, 23 N.J. 61, 127 A.2d 566, *appeal dismissed,* 354 U.S. 933 (1956); Mosko v. Dunbar, 135 Colo. 172, 309 P.2d 581 (1957); Stewart Motor Co. v. Omaha, 120 Neb. 776, 235 N.W. 332 (1931); Elizabeth v. Windsor-Fifth Ave. Inc., 31 N. J. Super. 187, 106 A.2d 9 (1954).

[13]Friedman v. New York, 302 N.Y. 75, 96 N.W.2d 184 (1950), *appeal denied,* 341 U.S. 907 (1951).

[14]State v. Towery, 239 N.C. 274, 79 S.E.2d 513, *appeal dismissed,* 347 U.S. 925 (1954). No violation of equal protection although drugstores allowed to sell same articles. Commonwealth v. Grochowiak, 184 Pa. Super, 522, 136 A.2d 145 (1957), *appeal denied,* 358 U.S. 47 (1957). The Pennsylvania court considered and rejected argument that closing movies under a fine was not arbitrary and unreasonable denial of equal protection.

[15]50 AM. JUR. *Sundays and Holidays* § 5 (1953).

[16]Crown Kosher Super Market of Mass. Inc. v. Gallagher, 176 F. Supp. 466 (D. Mass. 1959).

[17]See City of Tupelo v. Walton, 116 So. 2d 808 (Miss. 1960); Paramount-Richards Theatres v. City of Hattiesburg, 210 Miss. 271, 49 So. 2d 574 (1950); City of Pascagoula v. Henley, 169 Miss. 278, 153 So. 392 (1934); City of Gulfport v. Stratakos, 90 Miss. 489, 43 So. 812 (1907).

CONSTITUTIONAL LAW — THE COURT AND DUE PROCESS - DISMISSAL OF STATE EMPLOYEES INVOKING THE FIFTH AMENDMENT

Petitioner, a temporary county employee required by the county board of supervisors and a California statute[1] to answer certain questions concerning subversion before a congressional subcommittee, refused to testify under the First and Fifth Amendments as to whether he was presently a member of the Communist Party and was summarily discharged. As a temporary employee, he was not entitled to a hearing under the Civil Service Rules. Petitioner filed for a mandate of reinstatement, contending that the California statute under which he was discharged violated the due process clause of the Fourteenth Amendment. His summary dismissal was affirmed;[2] a petition for review was denied by the Supreme Court of California;[3] and the United States Supreme Court granted certiorari.[4] HELD: Affirmed. Summary discharge of a temporary state employee for his refusal on First and Fifth Amendment grounds to answer questions concerning subversion before a congressional subcommittee is not a deprivation of due process. *Nelson v. County of Los Angeles,* 80 Sup. Ct. 527 (1960).

Generally the Supreme Court has given the states a large measure of freedom in ensuring the loyalty of employees.[5] In 1952, however, while determining the validity of a statute requiring a loyalty oath, the Court held that the due process clause is offended, and arbitrary power is exercised, by the exclusion of persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they belong.[6] The case was distinguished from three cases decided in the preceeding two terms.[7] Further due process restrictions on discharge of state employees arose in 1956 in *Slochower v. Board of Education,*[8] in which a city employee utilized the privilege against self incrimination in express violation of a state statute while testifying before a federal legislative committee, and was summarily discharged. His dismissal was held a violation of due process and, thus, Fourteenth Amendment protection was extended to apply to state employees in-

[1]The applicable portion of the statute provides that any state employee who fails or refuses to appear or answer under oath on any ground whatsoever is guilty of insubordination and of violating this section and shall be suspended and dismissed from his employment in the manner provided by law.

[2]163 Cal. App. 2d 595, 329 P.2d 971 (1958).

[3]163 Cal. App. 2d 606, 329 P.2d 978 (1958).

[4]360 U.S. 928 (1959).

[5]See Annot., 44 A.L.R.2d 789 (1959). The holdings of the state courts on statutes requiring testimony on penalty of dismissal are also contained in the annotation.

[6]Wieman v. Updegraff, 344 U.S. 183 (1952). "If the rule be expressed as a presumption of disloyalty, it is a conclusive one."

[7]Compare Adler v. Bd. of Educ., 342 U.S. 485 (1952); Garner v. Board of Public Works, 341 U.S. 716 (1951); Gerende v. Board of Supervisors, 341 U.S. 56 (1951). Statutes did not make indiscriminate classification of innocent and knowing association.

[8]350 U.S. 551 (1956).

voking the Fifth Amendment before investigative committees.[9] Since no distinction was made between inquiries conducted by the states and federal investigations,[10] *Slochower* seemed to indicate a liberalizing of due process protection to state employees claiming Fifth Amendment protection. However, two cases decided in 1958[11] qualified its application. The dismissals of a subway conductor and a public school teacher were distinguished from *Slochower* and upheld, and from these cases it would seem that the protection afforded by *Slochower* does not apply to inquiries by a state to specifically determine the reliability of its own employees.[12]

The principal case limits the rule of *Slochower* to an even greater extent.[13] The statute held violative in *Slochower* specifically terminated employment automatically upon an invocation of the Fifth Amendment privilege. The statute upheld in the principal case makes refusal to answer on *any* grounds presumptive of insubordination and a ground for dismissal.[14] It would seem, therefore, that as long as a state statute bases discharge on a claim of insubordination in refusing to give information on any ground, it is not violative of due process to discharge the employee when he has, in fact, invoked the Fifth Amendment.

*Winton E. Williams*

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[9]Although it was argued that the petitioner's discharge stemmed from a statutory obligation that merely imposed a condition of public employment, this contention was rejected, and the court ruled that in practical effect, the questions asked were taken as confessed, and made the basis of the discharge.

[10]"No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive." Slochower v. Board of Education, 350 U.S. 551 (1956).

[11]Lerner v. Casey, 357 U.S. 468 (1958); Beilan v. Board of Education, 357 U.S. 399 (1958).

[12]Dismissal was not based on employee's assertion of Fifth Amendment rights. There is a difference between invoking the privilege in a state-conducted inquiry into the fitness of its own employees and a federal inquiry having nothing to do with qualifications for state employment. Lerner v. Casey, *supra* note 11. A similar distinction was made in Beilan v. Board of Education, *supra* note 11.

[13]Nelson v. County of Los Angeles, 80 Sup. Ct. 527 (1960) (dissenting opinion). Mr. Justice Brennan failed to find any distinction between the two cases. In both cases the invocation of the constitutional privilege was made equivalent to resignation without further investigation by the state. On this basis, he would find the summary discharge arbitrary and unreasonable and a violation of due process.

[14]It appears, at least superficially, that the only real factual difference in the two cases is that in the principal case petitioner was a temporary employee and, not having tenure, was subject to dismissal without a hearing. But as the basis for discharge and not the procedure followed seems to determine the case, this factor appears to have no importance.

CONSTITUTIONAL LAW — THE FIRST AMENDMENT AND QUESTIONING BAR APPLICANTS ON COMMUNIST AFFILIATIONS

Petitioner passed the Illinois Bar examination and applied for a certificate of approval from the Committee on Character and Fitness. This application was denied because the applicant refused to answer questions directed at determining whether he was a communist[1] and voiced a belief in the right of revolution to overthrow the government.[2] On appeal to the Illinois Supreme Court, this ruling of the committee was sustained.[3] As a result of subsequent decisions of the United States Supreme Court in similar cases,[4] the petitioner was granted a rehearing on the denial of his application. Again the committee refused to certify him as qualified for admission to the Illinois Bar,[5] and again he appealed to the Illinois Supreme Court. HELD: Affirmed. Denial of admission to the bar where the petitioner refuses to state whether he is a communist does not infringe upon the right to freedom of speech as guaranteed by the First Amendment or the due process clause of the Fourteenth Amendment. *In re Anastaplo,* 163 N.E.2d 429 (Ill. 1959).

Following World War II the states and professions increased interrogations concerning possible subversive affiliations of those seeking employment or certification.[6] Refusals of applications by investigating groups appear to be based on one of two reasons: prior membership in subversive organizations,[7] or refusal to answer questions directed to

[1]This refusal was based on a declared belief that such questions were unconstitutional, as being in derogation of the right to free speech guaranteed under the First and Fourteenth Amendments. Petitioner also asserted that he saw nothing particularly contradictory between membership and adherence to the tenets of the Communist Party and the taking of the oath to support the Constitution. *In re* Anastaplo, 3 Ill.2d 471, 121 N.E.2d 826 (1954).

[2]This belief was asserted to be based on the principles embraced by such men as Lincoln and Daniel Webster and found in the Declaration of Independence. *In re* Anastaplo, 163 N.E.2d 429, 440 (Ill. 1959).

[3]*In re* Anastaplo, 3 Ill.2d 471, 121 N.E.2d 826 (1954).

[4]Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

[5]At this hearing Anastaplo made no modification of his earlier position regarding a belief in the right of revolution or that the questions asked were in violation of the First and Fourteenth Amendments. He did present affidavits from additional persons who strongly asserted his loyalty. The committee, at no time, had any information that would indicate he was not a loyal American citizen. *In re* Anastaplo, 163 N.E.2d 429 (Ill. 1959).

[6]Where members of the legal profession are involved, this questioning seems to be directed at a determination of affirmative loyalty rather than disloyalty. This is the inference to be drawn from *In re* Summers, 325 U.S. 561 (1945), in which the petitioner, a conscientious objector, was refused admittance to the Illinois Bar because he could not, in good faith, take an oath to support the Constitution of Illinois. This Constitution authorizes the legislature to draft men into the militia and does not exclude conscientious objectors in time of war. ILL. CONST. art. 12, § 6.

[7]See Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

this area.[8] The right of duly appointed committees of the bench or bar to conduct inquiries into the professional conduct of attorneys and to require answers thereto was recognized long before the problem of communist affiliation arose.[9] However, investigations of communist membership have been resisted and challenged in the courts on the basis of a difference between unethical conduct and personal belief. In a recent decision, the Court ruled that prior membership in the Communist Party is not necessarily a sufficient ground for denial of an application to the bar.[10] But when applicants refuse to answer questions on constitutional grounds, a more difficult problem arises.[11] The Court has sustained dismissal from employment when the employee refused to answer questions concerning his possible communist affiliations by invoking the privilege of the Fifth Amendment.[12] Initially the Court was reluctant to hear cases when the refusal to answer was based on the First Amendment,[13] but later ruled that dismissal due to such refusal did not constitute a violation of the First or Fourteenth Amendments.[14] But on March 7, 1960, the Court granted certiorari on the second California decision in *Konigsberg v. State Bar of California*,[15] where the petitioner's refusal to answer certain questions was founded on the First Amendment.

The principal case and the *Konigsberg* case have placed in issue the power of state bar associations to deny admittance to an applicant merely because he refuses to answer questions he believes are prohibited

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[8]Konigsberg v. State Bar of California, 353 U.S. 252 (1957). See Beilan v. Board of Public Education, 357 U.S. 399 (1958); Lerner v. Casey, 357 U.S. 468 (1958).

[9]*E.g.*, People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928).

[10]Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). The petitioner had been a member of the Communist Party from 1932 until 1940. In overruling the Supreme Court of New Mexico, the Court considered the paralysis of our economic system during this period and the fact that the Communist Party, at this time, was a lawful political party with its presidential nominee on the ballot in 35 states, including New Mexico.

[11]The courts have basically three considerations that must be weighed in reaching a decision. These are: (1) The rights of citizens under the First, Fifth, and Fourteenth Amendments, Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Scheiner v. State, 82 So. 2d 657 (Fla. 1955); (2) whether the objectives of the petitioner amount to a right or only a privilege, Schware v. Board of Bar Examiners, *supra* note 10; and (3) the interests of the individual as opposed to the interests of the public, Uphaus v. Wyman, 360 U.S. 109 (1958).

[12]Lerner v. Casey, 357 U.S. 468 (1958) (discharged upon a finding of doubtful trust and reliability rather than on any inference of communist affiliation). *But see* Sheiner v. State, 82 So. 2d 657 (Fla. 1955) (disbarment not upheld); *cf.* Slochower v. Board of Higher Educ. of N.Y. City, 350 U.S. 551 (1956).

[13]*In re* Anastaplo, 348 U.S. 946 (1955). "The appeal is dismissed for want of a substantial federal question."

[14]Beilan v. Board of Education, 357 U.S. 399 (1958).

[15]28 U.S.L. WEEK 3258 (U.S. March 7, 1960) (No. 661). Apparently, one of the questions to be answered is, "Can a state, consistently with Fourteenth Amendment Due Process and Equal Protection clauses, deny otherwise qualified applicant admission to the bar solely for his refusal to reveal his political affiliations?"

by the Constitution. Initially, these two cases could be distinguished,[16] but ultimately both applicants were denied admission to the bar solely because they refused to answer the examiners' questions. The Court previously remanded the *Konigsberg* case to the California Supreme Court, citing as error, the bar committee's failure to forewarn the petitioner of the consequences of his silence, and their construction of his silence as a presumption against his moral character.[17] It is doubtful that the Court anticipated the California Court would send the case, along with these instructions, back to the Committee of Bar Examiners, rather than entering final judgment. Possibly the case will be finally decided on this procedural matter, instead of the substantive question.[18]

The future of *Anastaplo* is certainly not clear. Though the Supreme Court of the United States once declined to hear this case,[19] subsequent events might bring it before the highest tribunal. The outcome of the *Konigsberg* case will go a long way toward settling the issue of whether or not a state may decline to admit a qualified applicant to the bar because he refuses to say whether he is a communist.[20] It is doubtful that the Court could rule against the *Anastaplo* decision without answering one of two questions it has consistently avoided. These questions are: Is the practice of law a right or a privilege, and does membership in the Communist Party, as it is presently organized, go beyond the freedom to hold a political belief? After the *Konigsberg* hearing and after these questions are answered, there may be settled law upon which to proceed. Until such time, the decision of the *Anastaplo* case appears to be at least reasonable.

*William M. Champion*

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[16]The Illinois Bar Examiners have consistently refused to admit Anastaplo on the sole ground of his refusal to state whether he was a communist. In California, Konigsberg was denied admission because the examiners found that by his refusal to answer this question a *presumption* against his moral character was raised.

[17]Konigsberg v. State Bar of California, 353 U.S. 252 (1957).

[18]The second question the Court will consider in this case is whether or not the Supreme Court of California complied with their instructions. 28 U.S.L. WEEK 3258 (U.S. March 7, 1960) (No. 661).

[19]*In re* Anastaplo, 348 U.S. 946 (1955).

[20]The cases sustaining the discharge of teachers and other state employees on this ground are distinguishable. They involved the discharge of an employee by his employer. It must be noted that in Beilan v. Board of Public Education, 357 U.S. 399 (1958), the state did not deny petitioner permission to teach in private schools or accept employment as a private tutor within the state. This distinction was recognized by the Supreme Court of Massachusetts when answering questions propounded by the State House of Representatives. In the first of two opinions the court said that a proposed law providing for the discharge of *any* teacher in the state who refused to testify as to whether he was a communist would be unconstitutional. Opinion of the Justices, 332 Mass. 763, 126 N.E.2d 100 (1955). In the second opinion the same court advised that if the law was restricted to teachers in *state supported schools* it would be valid. Opinion of the Justices, 332 Mass. 785, 127 N.E.2d 663 (1955).

[EDITOR'S NOTE: After this note was written, the Supreme Court granted certiorari, 28 U.S.L. WEEK 3326 (U.S. May 3, 1960) (No. 801).]

CONSTITUTIONAL LAW—THE REASONABLENESS OF A SEARCH

Federal officers suspected that the business of accepting wagers was being conducted in a certain apartment, and, in an effort to obtain sufficient evidence to justify a search of the apartment and an arrest of the parties suspected, they drove an antenna spike[1] into the party wall of the adjoining row house so that it made contact with the heating duct. By means of this electrical apparatus the officers were able to obtain the evidence they desired. HELD: Affirmed. The insertion of the antenna spike into the party wall so that all conversation in the adjoining apartment could be heard did not constitute an unreasonable search in violation of the Fourth Amendment. *Silverman v. United States,* No. 15186 D. C. Cir., Feb. 4, 1960.

The right to be secure from unreasonable searches and seizures has long existed in the United States and England,[2] and it has come to be looked upon as a fundamental right.[3] At common law and under the Constitution until 1914 the people were to be secure from these searches and seizures, but information obtained by such action was nevertheless admissible as evidence in court. In 1914 it was established in the federal courts that evidence obtained by unreasonable searches and seizures is not admissible.[4] This holding strengthened the rights of individuals at the expense of letting some who probably could have been convicted go free.[5] The new rule also greatly increased the significance of the question of what constitutes an unreasonable search and seizure. In 1914 the Court declared the security of individuals superior to even the most praiseworthy efforts to apprehend criminals.[6] In accord with this view the Court continued to advocate a liberal construction of the Fourth Amendment in favor of the individual.[7] This extremely liberal view was slightly modified in 1924 when the Court recognized that public interests as well as the interests and rights of individual citizens must be conserved.[8]

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[1]This spike was a needle about twelve inches long containing an amplifying current and connected to earphones. For the conversation in the adjoining apartment to be successfully transmitted it was necessary that the needle come in contact with a solid object capable of vibration, and in inserting it into the wall the officers anticipated that it would strike the heating duct which would have the effect of a giant microphone. From the success the officers had, it can certainly be inferred that they hit the duct.

[2]See Boyd v. United States, 116 U.S. 616 (1886).

[3]See Gouled v. United States, 255 U.S. 304 (1921).

[4]Weeks v. United States, 232 U.S. 383 (1914).

[5]See Gouled v. United States, 255 U.S. 298 (1921); Amos v. United States, 255 U.S. 313 (1921); Weeks v. United States, 232 U.S. 383 (1914); Boyd v. United States, 116 U.S. 616 (1886).

[6]Weeks v. United States, 232 U.S. 383 (1914).

[7]See Grau v. United States, 287 U.S. 124 (1932); Go-Bart v. United States, 282 U.S. 357 (1931); Byars v. United States, 272 U.S. 28 (1927); Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[8]Carrol v. United States, 267 U.S. 132 (1924). The line between reasonable and unreasonable seems very narrow. *Compare* Gouled v. United States, 255 U.S. 298 (1921) (unreasonable search when with consent but by stealth); *and* McDonald v.

In rendering its decision in the instant case, the Court relied chiefly on two decisions, *Olmstead v. United States*[9] and *Goldman v. United States*,[10] both of which held evidence obtained by electronic devices admissible. In *Olmstead* the Court defined an unreasonable search as a search of one's person, papers, or tangible effects or an actual invasion of his house.[11] The decision in the *Goldman* case found its sole basis in *Olmstead*. It carried the requirement that there be an invasion before the search would be unreasonable even further, for it held that applying a very sensitive dictaphone to a partition wall did not constitute an unreasonable search. In another case involving an electronic device the Court held that where one enters premises by invitation, but carrying a concealed microphone, no unreasonable search is made.[12] Thus it has been established that absent a wrongful invasion of one's premises the use of an electronic device to overhear conversation does not constitute unreasonable search. If, however, there is an invasion, if only to conceal a microphone, the Court would probably hold that a violation of the Fourth Amendment.[13] In the noted case there was no definite evidence to show how far the spike was inserted into the party wall, but the Court refused to allow the difference of a few inches to make an invasion. Since there was no invasion, the court found no unreasonable search.

This case raises the important problem of determining whether prosecution of criminals or the protection of the right of privacy is to be supreme. In this day when criminals have every modern device to aid them, officers of the law have a very real need of similar devices if they

United States, 335 U.S. 451 (1948) (search by looking through transom unreasonable); *and* Brock v. United States, 223 F2d 681 (5th Cir. 1955) (search by looking through bedroom window unreasonable); *with* United States v. Lee, 274 U.S. 559 (1927) (reasonable search to observe by aid of a light); *and* United States v. Rabinowitz, 339 U.S. 56 (1950) (search reasonable if made of premises in conjunction with arrest); *and* Hester v. United States, 265 U.S. 57 (1924) (search of open fields reasonable).

[9]277 U.S. 438 (1928) (5-to-4 decision). The court found no unreasonable search and seizure when federal officers tapped telephone wires to get information. One of the reasons given was that when one talked on the telephone he intended to project his voice beyond the limits of his house. Mr. Justice Brandeis strongly dissented stating his fear that science would make it possible for the basic rights of personal liberty and privacy to be practically destroyed without the commission of any act which, in accord with this decision, would constitute an unreasonable search.

[10]316 U.S. 129 (1942) (5-to-3 decision). The three dissenting justices desired to overrule Olmstead v. United States. In his dissent, Goldman v. United States, 316 U.S. 129, 139 (1942), Mr. Justice Murphy stated that allowing one to hear everything that was said within a house, without entering it, by means of an electronic device was a direct invasion of the privacy of the occupant. He expressed a fear that, if the Fourth Amendment were interpreted literally so as to require an invasion before declaring a search to be unreasonable, the rights guaranteed therein would become merely illusory due to the changes that have occurred since it was written.

[11]Olmstead v. United States, 277 U.S. 466 (1928).

[12]On Lee v. United States, 343 U.S. 747 (1952).

[13]See Irvine v. California, 347 U.S. 128 (1954).

are to combat crimes effectively. But, in the effort to allow officers more freedom in obtaining evidence by the use of scientific equipment, the fundamental right of privacy has been further infringed upon, as Mr. Justice Brandeis predicted in his dissent in *Olmstead* and as the other three justices who dissented in *Olmstead* and the three justices who dissented in *Goldman* seemed to fear.

*John C. Love, Jr.*

### Homesteads — Right of Cotenant to Partition Property Subject to Homestead Right in Surviving Spouse

This was a proceeding between a widower and his deceased wife's daughter by a former marriage, involving right of possesssion of real property occupied and acquired as tenants in common by widower and deceased wife, who devised her interest in property to such daughter. The lower court held that the widower was entitled to the residence as a homestead and that the property was not subject to partition. Held: Affirmed.[1] Where husband and wife owned property as tenants in common and wife died, devising her interest to her daughter, the widower retained his undivided one-half fee simple interest in the property while the daughter acquired the other one-half. The daughter was not allowed to have her undivided interest in the property partitioned so long as the surviving spouse remained a widower, because the surviving spouse could claim his homestead in the property. *Biggs v. Roberts,* 115 So. 2d 151 (Miss. 1959).

The law governing homestead rights was unknown to the common law and is entirely dependent upon constitutional or statutory provisions.[2] The court in the instant case focused its attention on two statutes[3] in this state involving homestead rights to determine whether the devisee of an undivided interest in property should be allowed a partition of the property where it had been owned by the decedent and the surviving spouse as tenants in common and occupied as their homestead.

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[1]Decision was 5-4, with Holmes, J., and Kyle, Ethridge and Gillespie, JJ., dissenting. Supreme Court reversed part of the lower court's decision where the lower court had allowed the widower to renounce the deceased wife's will and take by inheritance one-half of her one-half interest in the land in suit. The court held that the widower was not entitled to renounce his wife's will in view of his ownership of property far in excess of the value of his wife's property, citing Miss. Code Ann. § 670 (1942).

[2]See 26 Am. Jur. *Homestead* § 3 (1954). The homestead exemption was a Texas creation. Lucas v. Lucas, 104 Tex. 636, 143 S.W. 1153 (1912). See Tex. Const. art. 16, § 50; Tex. Civ. Stat. art. 3833 (1925). The homestead exemption statute in this state is Miss. Code Ann. § 317 (1942).

[3]The homestead exemption statute, Miss. Code Ann. § 317 (1942); and the statute preventing partition of exempt property, Miss. Code Ann. § 478 (1942). Although not mentioned by the court the statute which allows a cotenant to have a partition sale is Miss. Code Ann. § 961 (1942).

The Mississippi Code[4] prevents partition of exempt property where it *descends* to the surviving spouse and others. In interpreting this statute the court declared that it was not absolutely necessary for the property to *descend* by intestate succession in order for the surviving spouse to claim it as a homestead.[5] In further support of their interpretation, the majority cited authority for the rule that homestead statutes are to be construed liberally in favor of the exemptionist.[6] The dissenting opinion, on the other hand, in referring to the same statute,[7] reasoned that where the language is plain and unambiguous, there is no room for construction and the addition of any language to the statute would be an intrenchment upon the power of the legislature.[8] In other words, the four dissenting Justices were of the opinion that the statute is restricted to property descending by intestate succession and does not properly include property passing by devise.

The other statute considered by the court was the homestead exemption statute,[9] which was viewed in relation to *Osburn v. Sims*,[10] an earlier decision very similar in its facts to the instant case. That case held that the owner could devise his homestead as any other property and the widow could not revoke the will where she had a separate estate equal in value to that which she would have taken had the husband died intestate.[11] The majority held that the *Osburn* case could not be followed here to defeat the widower's homestead rights because of a change which had been made in the exemption statute.[12] The dissent, however, stated that the amendment to the exemption statute had no application to the question under consideration because the change merely provided that an exemptionist over sixty may continue to claim his exemption even

[4]Miss. Code Ann. § 478 (1942). This case was concerned with the sentence within that section which reads: "Likewise, where a decedent leaves a widower to whom, with others, her exempt property, real and personal, *descends*, the same shall not be subject to partition or sale for partition during the period of his being a widower, as long as it is occupied or used by the widower, unless he consent." (Emphasis added).

[5]115 So. 2d at 153. The court relied on Lackey v. Harrington, 162 Miss. 512, 516, 139 So. 313, 314 (1931), quoting therefrom: "The widow, having redeemed the property so far as it affects her rights, has title against the other tenants to occupy same as a homestead, so long as she remains a widow, *regardless of the source from which the title of the cotenants is derived.* The statute giving the widow the right to occupy the homestead during her widowhood is to be liberally construed, and serves a beneficial public purpose." (Emphasis added by the court).

[6]115 So. 2d at 153.

[7]Miss. Code Ann. §478 (1942).

[8]115 So. 2d at 156.

[9]Miss. Code Ann. §317 (1942).

[10]Osburn v. Sims, 62 Miss. 429 (1884).

[11]See note 10 *supra.*

[12]115 So. 2d 151, 154. Miss. Laws 1914, ch. 225. The change the court refers to is: "But husband or wife, widower or widow, over sixty years of age, who has been an exemptionist under this section, shall not be deprived of such exemption because of not having a family or not occupying the homestead."

though he is not occupying the homestead.[13] Morever, the dissent was of the opinion that the result reached in *Lackey v. Harrington*,[14] the principal authority cited by the majority, was in support of, rather than in conflict with, *Osburn v. Sims*.[15] In the *Lackey* case the surviving spouse and the children of the decedent had acquired their interest in the property by descent,[16] thereby falling squarely within the statute preventing a partition.

It appears that the principal effect of the decision in the instant case is to enlarge the rights of the exemptionist under the two homestead statutes considered by the court.[17] First, literally interpreted, Section 478 of the Mississippi Code[18] provides that the exempt property must descend to the surviving spouse and others before a partition is prevented,[18] whereas the majority's interpretation prevents partition where the decedent *devised* her interest in property on which the surviving spouse previously claimed an exemption.[19] Second, the interpretation given to the exemption statute[20] appears not only to preserve the former exemption of the surviving spouse but to enlarge the exemption so as to include his cotenant's interest in the property. This court has previously held that where a husband and wife were tenants in common the husband's homestead exemption extended only to his undivided interest in the property[21] and that a partition sale of the homestead is not prevented where the homestead rights exist only in respect to an undivided interest in the land.[22] Therefore it is submitted that the exemption allowed the widower should have extended only to his undivided interest in the property, and this should not have prevented a partition of the common property by his cotenant.

*Thomas G. Lilly*

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[13]115 So. 2d at 157.

[14]162 Miss. 512, 139 So. 313 (1931).

[15]62 Miss. 429 (1884).

[16]115 So. 2d 151, 158.

[17]See note 3 *supra*.

[18]See note 4 *supra*.

[19]The purposes of the homestead laws, as given in Jackson v. Coleman, 115 Miss. 535, 76 So. 545 (1917), are: "to enable the debtor to earn a living and create the means with which to pay debts, and to prevent hardships and suffering of families growing out of the improvident contracts of the head of the family, incurring debts." To effectuate these objectives, the court adopted the rule of liberal construction in favor of the exemptionist. In the instant case, however, the widower owned property interests in his own right sufficiently large to prevent his renouncing the will, and this should negate the need for liberal construction in his favor. Futhermore, the principal authority cited by the majority for its construction of the statute was Lackey v. Harrington, 162 Miss. 512, 139 So. 313 (1931), a case where there was no will, and the language quoted was later criticized in Solomon v. Solomon, 187 Miss. 22, 192 So. 10 (1939) as " . . .rather broad. . . and must be limited. . ." to the case the court was there deciding.

[20]See note 3 *supra*.

[21]Krippendorf v. Wolf, 70 Miss. 81, 12 So. 26 (1892).

[22]Solomon v. Solomon, 187 Miss. 22, 192 So. 10 (1939).

TORTS — NEGLIGENCE — SALE OF INTOXICATING LIQUOR AS PROXIMATE CAUSE OF INEBRIATE'S TORT

A minor, while driving under the influence of alcoholic beverages, collided with a car driven by plaintiff's husband; causing his death. Plaintiff alleged that defendant tavern keepers wrongfully[1] and negligently sold alcoholic beverages to the minor, and as a result, caused the accident. HELD: If defendant tavern keepers wrongfully and negligently sold alcoholic beverages to a minor causing his intoxication which in turn caused or contributed to negligent operation of the motor vehicle at the time of the fatal accident, then a jury could find that the unlawful, negligent conduct of the defendants proximately caused plaintiff's injuries. *Rappaport v. Nichols,* 31 N.J. 188, 156 A.2d 1 (1959).

At common law no remedy exists against the dispenser of liquor for injuries and damages resulting from the acts of intoxicated persons, either on the theory that dispensing the liquor constitutes a direct wrong or actionable negligence.[2] The proximate cause of the injury is found in the act of the purchaser in *drinking* the liquor rather than the act of the vendor in *selling* it.[3] Many states, in order to avoid the effect of the case law,[4] have passed statutes known as "Civil Damage Acts" or "Dramshop Acts"[5], which provide for liability on the part of persons selling or giving away intoxicating liquor to minors or intoxicants who, as a result of their intoxication, injure third persons. However, with one possible exception,[6] the cases hold that no right of action exists except as expressly given by the statute.[7] There is no Civil Damage Law or Dramshop Act in New Jersey where the instant case arose.[8]

The New Jersey Supreme Court based its rather remarkable deci-

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[1]N. J. STAT. ANN., § 77 (1937), as amended L. 1939, c. 228, p. 625, § 1, "Anyone who sells any alcoholic beverage to a minor shall be guilty of a misdemeanor; . . . ." The amendment is concerned with the defense available to the seller. Alcoholic beverage is defined as "b. Any fluid or solid capable of being converted into a fluid, suitable for human consumption, and having an alcoholic content of one per cent by volume, including alcohol, beer . . . ." N. J. STAT. ANN., § 1 (1937).

[2]See, *e.g.,* Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949).

[3]See, *e.g.,* Fleckner v. Dionne, *supra* note 2.

[4]See, e.g., Hyba v. Horneman, 302 Ill. App. 143, 23 N.E.2d 564 (1939).

[5]The following states have civil damage acts broad enough in scope to allow recovery in the factual situation present here: ALA. CODE. tit. 7, §§ 120, 121 (1940); CONN. GEN. STAT. REV. § 102 (1958); ILL. REV. STAT. ch. 43, § 135 (14) (1957); IOWA CODE ANN. § 129.2 (1946); ME. REV. STAT. ANN. ch. 61, § 95 (1954); MICH STAT. ANN. § 18.993 (1957); MINN. STAT. ANN. § 340.95 (1957); N.Y. CIV. RIGHTS § 16; N.D. REV. CODE § 5-0121 (1943); OHIO REV. CODE ANN. § 4399.01 (Page 1954); OKLA. STAT. ANN. tit. 37, § 121 (1958); WASH. REV. CODE § 24.100 (1949); WIS. STAT. ANN. § 176.35 (1957).

[6]See Waynick v. Chicago's Last Department Store, 269 F.2d 322 (7th Cir. 1959).

[7]*E.g.* Kennedy v. Garrigan, 235 S.D. 265, 121 N.W. 783 (1909).

[8]New Jersey had a Civil Damage Law during prohibition days, but it was repealed in 1934. See Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1, 8 (1959).

sion on one dissenting opinion,[9] several decisions under Civil Damage statutes,[10] one decision based on common law negligence principles from the Court of Appeals, 7th Circuit,[11] and analogous cases based on different factual circumstances.[12] Perhaps the strongest reason for the decision stems from the court's desire for social reform.[13] However desirable that reform may be, it must be weighed against the consequences of striking down a staunch common law principle. Perhaps the court has lost sight of the fact that the common law has always held accountable those who are directly responsible for injuries to the person or property of another.[14]

*Donald K. Marcus*

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[9]"[N]egligence may be the proximate cause of an injury to another even though the act of a third person intervenes, if a person of ordinary prudence could reasonably anticipate the probability of the third person's conduct." Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530, 534-5 (1949). Mr. Justice Dooling relied by analogy on decisions imposing liability on persons negligently loaning their cars to intoxicated persons who then injure third parties.

[10]McKinney v. Foster, 291 Pa. 221, 137 A.2d 502 (1958); Manning v. Yokas, 289 Pa. 136, 132 A.2d 198 (1957).

[11]Waynick v. Chicago's Last Department Store, 269 F.2d 322 (7th Cir. 1959). The court stated that neither the Illinois Dramshop Act nor the Michigan Liquor Control Act could be a basis for their decision since the unlawful sale took place in Illinois and the fatal collision occurred in Michigan, but said, "The Illinois act making unlawful the sale of alcoholic liquor to any intoxicated person is for the protection of any member of the public who might be injured ... as a result of the drunkeness to which the particular sale of alcoholic liquor contributes. Obviously the plaintiffs in the case at bar are entitled to the protection given by § 131 of the Illinois Act." Waynick v. Chicago's Last Department Store, *supra* at 325-6. *Query*: If the Illinois statute imposing civil damage liability on the defendants is inaplicable, then how can § 131 (forbidding the sale of alcoholic liquor to minors, intoxicants, etc.) of the same Illinois Liquor Control Act be applied? See Waynick v. Chicago's Last Department Store, *supra* at 326-7 (dissenting opinion).

[12]Ney v. Yellow Cab Co., 2 Ill.2d 74, 117 N.E.2d 74 (1954) (Defendant unlawfully left keys in his unattended cab; a thief stole the cab and collided with plaintiff); Anderson v. Settergren, 100 Minn. 294, 111 N.W. 279 (1907) (Unlawful sale of cartridges and loan of rifle to a minor).

[13]In Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959), it was said at p. 10:

> Liquor licensees who operate their businesses by way of privilege rather than as of right, have long been under strict obligation not to serve minors and intoxicated persons and if, as is likely, the result we have reached in the conscientious exercise of our traditional judicial function substantially increases their diligence in honoring that obligation then the public interest will indeed be very well served.

[14]Waynick v. Chicago's Last Department Store, 269 F.2d 322, 327 (7th Cir. 1959) (dissenting opinion); HOLMES, THE COMMON LAW 80 (1881). If the Mississippi Legislature ever passes a local option liquor bill, it might well consider the prospects of a Mississippi Dramshop Act.

TORTS — SOVEREIGN IMMUNITY — TORT CLAIMS AGAINST THE STATE

Plaintiff brought this action against Kaneland Unit School District for personal injuries sustained by plaintiff when the school bus in which he was riding left the road, allegedly as a result of the driver's negligence. The lower court dismissed plaintiff's action on the ground that the school district could not be sued by reason of the doctrine of sovereign immunity. In his appeal plaintiff recognized the prevalence of the doctrine of sovereign immunity, but boldly prayed that the Court abolish the doctrine in toto. HELD: Reversed and remanded. The rule of school district tort immunity is unjust, unsupported by valid reason, and has no place in modern society. *Molitor v. Kaneland Community Unit District No.* 302, 163 N.E.2d 89 (Ill. 1959).

The principle is deeply embedded in our jurisprudence that the state cannot be sued except by its own legislative consent.[1] The origin of the doctrine of governmental immunity in tort has been attributed to the medieval theory of the divine right of kings, which is expressed in the familiar maxim, "the king can do no wrong."[2] Encountering the obvious difficulty of applying the theory in a democratic republic,[3] the Supreme Court of the United States repudiated the divine right of kings theory,[4] but later justified the doctrine of governmental immunity on other grounds.[5] American legal scholarship has in a tremendous body

[1]Shumate, *Tort Claims Against State Governments,* 9 LAW & CONTEMPORARY PROB. 242 (1942). See also note 6 *infra.*

[2]Borchard, *Governmental Responsibility in Tort,* 36 YALE L.J. 1, 17 (1926). Coke remarked that "it is a maxim of the law that the King can do no wrong." *Id.* at 31. And Blackstone wrote that "the king, moreover, is not only incapable of doing wrong, but even of thinking wrong: he can never mean to do an improper thing: in him is no folly or weakness." 1 BLACKSTONE, COMMENTARIES 246.

[3]In Pugh,*Historical Approach to the Doctrine of Sovereign Immunity,* 13 LA. L.J. 476 (1953), it was said at 480, 481:

> Since the days of the Declaration of Independence, the keystone of American political thought has been responsible government, and the entire history of the American Revolution would seem to negate the applicability in this country of the English maxim that the king can do no wrong. ...Despite the absence of historical and philosophical justification, the doctrine of sovereign immunity is today a part of American legal dogma. Common sense alone would indicate that the adoption of such a theory in a democratic state must of necessity give rise to much confusion and unjustified rationalization....

[4]See Langford v. United States, 101 U.S. 341 (1879).

[5]See The Western Maid, 257 U.S. 419 (1922); Kawananakoa v. Polyblank, 205 U.S. 349 (1907); Cohens v. Virginia, 19 U.S. 264 (1821). In Cohens v. Virginia, at 411-412, Chief Justice Marshall justified the doctrine not on historical grounds, but simply stated: "The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits." In Kawananakoa v. Polyblank, *supra* at 353, Mr. Justice Holmes wrote: "Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the

of literature severely criticized this doctrine as lacking any justification,[6] and how it was ever transplanted into American law has been described as "one of the mysteries of legal evolution."[7] The criticism of the doctrine espoused by the commentators,[8] coupled with the expansion of governmental activities, led the federal[9] and some state governments[10] to relax, in most cases by piecemeal,[11] some of their immunity. Though there are courts[12] and text writers[13] who feel that the injustice of the doctrine can be alleviated by the judiciary, most writers recognize the

right depends." And in The Western Maid, *supra* at 433, he stated: "The United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so." For an excellent analysis of Mr. Justice Holmes's position, see Borchard, *Governmental Responsibility in Tort,* 36 YALE L.J. 757 (1927).

[6]See Borchard, *Government Liability in Tort,* 34 YALE L.J. 1, 129, 229 (1924); Borchard, *Government Responsibility in Tort,* 36 YALE L.J. 1, 757, 1039 (1926); Borchard, *Governmental Responsibility in Tort,* 28 COLUM. L. REV. 734 (1928); Borchard, *Theories of Governmental Responsibility in Tort,* 28 COLUM. L. REV. 734 (1928); Borchard, *State and Municipal Liability in Tort,* 20 A.B.A.J. 747 (1934); Blachly & Oatman, *Approaches to Governmental Liability in Torts: A Comparative Survey,* 9 LAW & CONTEMP. PROB. 181 (1942); Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability,* 9 LAW & CONTEMP. PROB. 214 (1942); Shumate, *Tort Claims Against State Governments,* 9 LAW & CONTEMP. PROB. 242 (1942); Leflar & Kantrowitz, *Tort Liability of the States,* 29 N.Y.U.L. REV. 1363 (1954); Anderson, *Claims Against States,* 7 VAND. L. REV. 234 (1954); Note, 40 MINN. L. REV. 234 (1956).

[7]Borchard, *Government Liability in Tort,* 34 YALE L.J. 1, 4 (1924).

[8]See authorities cited note 6 *supra.*

[9]See Federal Torts Claims Act, 60 Stat. 843 (1946), 28 U.S.C. § 1346 (b) (1948).

[10]See Leflar & Kantrowitz, note 6 *supra,* for a summary of the law in each of the then existing forty-eight states.

[11]"One common feature of the development of such tort liability as now exists is its piecemeal character. Practically every one of the states which now affords relief generally to persons injured by its torts did away with its sovereign immunity only a little bit at a time. In no instance was general liability undertaken by one broad jump away from the old rule." Leflar and Kantrowitz, *supra* note 6, at 1409-1410.

[12]See, *e.g.,* Molitor v. Kaneland Community Unit Dist. No. 302, 163 N.E.2d 89 (Ill. 1959).

[13]Green, *Freedom of Litigation,* 38 ILL. L. REV. 355 (1944). Dean Green writing with reference to municipal tort immunity said at 382-383:

> All that is required to get rid of the immunities now protecting municipalities from their just responsibilities is a moderate amount of common law statesmanship on the bench. A few forthright decisions could quickly clear the way.... Nor will it do to await bit by bit, piecemeal, correction by legislative action at isolated points under the impulse of pressure groups. ...It is not the legislature's problem, and intrusion into the field of common law by a legislature can only be justified when the courts have refused to exercise their own function. To this fact the courts should be highly sensitive, for it is to them that is given supremacy in the administration of justice through the common law. Only they can keep its processes of litigation open to those who need its protection.

See generally Note, 8 Miss. L. J. 513 (1936).

problem as being legislative.[14] States which have undertaken responsibility have employed primarily one of three methods for the adjudication of claims: by the legislature;[15] by administrative boards;[16] and by the courts.[17] Four states[18] have constitutional provisions prohibiting the state from ever being a defendant in a lawsuit, yet, comparatively speaking, these states have devised means enabling them to exercise a higher degree of responsibility[19] than most states having no constitutional prohibitions. It can be generally said that there is no governmental liability for tort in Mississippi.[20] The only constitutional provision dealing with governmental liability is the common one, eminent domain,[21] but this provision has been interpreted to authorize only an action for damages for the taking of property for public use, but not for the negligent use or handling of what was previously taken.[22] There is a general statute[23] permitting a suit to be brought against the state for claims after demand has been made of the auditor of public accounts, and his refusal. But this statute has been interpreted to allow suits only on claims which the legislature has made valid.[24] Though a statute provides that the Highway Department may sue and be sued,[25] this statute

[14]See Borchard, *State and Municipal Liability in Tort,* 20 A.B.A.J. 747 (1934); Borchard, *Proposed State and Local Statutes Imposing Public Liability in Tort,* 9 LAW & CONTEMP. PROB. 282 (1942).

[15]This method has been subjected to the following lines of criticism: (a) Tortious conduct involves legal questions which should be adjudicated by men with legal training; (b) political considerations, and not the merits of the claim, may sometimes govern the claim's disposition; (c) due to the infrequency of legislative sessions, a delay of two years may amount to a substantial denial of justice; and (d) legislators must spend valuable time hearing these claims, time which could be spent on bills affecting the general welfare.

[16]Shumate, *supra* note 6, at 251.

[17]Shumate, *supra* note 6, at 253. In New York a statute provides in substance that the state waives its immunity from liability and action and assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions against individuals or corporations. N.Y. Ct. Cl. Act § 8, N. Y. Laws 1939, ch. 860.

[18]Alabama, Arkansas, Illinois, and West Virginia.

[19]Alabama's constitution provides, for example, that the state shall never be made a defendant in any court. But the legislature has set up a Board of Adjustment to hear claims for damages to persons and property caused by the state or its agencies.

[20]Leflar & Kantrowitz, *supra* note 6. This study classified the states into five groups, based on the extent to which tort claims were allowed. Mississippi was listed in the lowest classification entitled "Responsibility Almost Never Undertaken," Leflar & Kantrowitz, *supra* note 6, at 1407.

[21]MISS. CONST. art. III, §17.

[22]State Highway Comm'n v. McClendon, 212 Miss. 18, 53 So. 2d 35 (1951).

[23]MISS. CODE ANN. §4387 (1956).

[24]See Hall v. State, 79 Miss. 38, 29 So. 994 (1901).

[25]MISS. CODE ANN. § 8038 (c) (Supp. 1958).

has been interpreted to authorize only claims independently legalized.[26] The only legislation that could be found that would seem to waive governmental immunity is the statute authorizing claims against the county or municipal separate school district for the negligent operation of school buses.[27]

Why should we continue to give effect to a doctrine of irresponsibility which has been universally condemned as productive of unnecessary injustice? The practical experience of modern government shows that the state and its agencies may injure the individual citizen in a variety of ways. Though the state cannot be an insurer against all defects, a responsible government cannot ignore the most flagrant of the injuries wrongfully sustained by the citizen. The trend today is toward responsible government, that is, responsible toward those for whose benefit and needs it presumably exists. It would be a recognition of sound principles of social and ethical policy, and an enlightened contribution to justice for our state to abolish the doctrine of sovereign immunity.[28]

*Jerome B. Steen*

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[26]See State Highway Comm'n v. Knight, 170 Miss. 60, 154 So. 263 (1934); State Highway Comm'n v. Gully, 167 Miss. 631, 145 So. 351 (1933); Stewart v. State Highway Comm'n, 166 Miss. 43, 148 So. 218 (1933).

[27]MISS. CODE ANN. § 6336-19 (Supp. 1958). The pertintent part of this statute the defense of governmental immunity in bar to any such action or recovery. Such suit may be tried as other civil actions."

[28]Leflar & Kantrowitz, *supra* note 6, at 1363-1364:

> If one seeks to discover the reasons for this reluctance to do what nearly everyone agrees ought to be done, he finds three factors nearly always present: (1) an amorphous mass of cumbrous language about sovereignty and the nature of law which is usually contradictory within itself and is always contradicted by such modern legal facts as the Federal Tort Claims Act, the laws of most civilized nations other than our own, the New York law, and lesser reforms in most of the other American states; (2) legislative and judicial inertia, which is probably the most potent single explanation that anyone can give as to why the American law is what it is; and (3) financial fears, that the states and their subdivisions actually cannot afford, in the face of other more urgent demands upon their treasuries, to pay out what they would be required to pay if tort liability were accepted.

# RECENT BOOKS

## VOICES IN COURT

**A Treasury of The Law**
**Edited by William H. Davenport, New York**
**The MacMillan Company, 1958: $6.95: pp 585.**

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"Old Judge and Young Lawyer" from *The Just and the Unjust* is tremendous. Its concluding paragraphs so aptly describe the day in the life of a practicing lawyer:

> 'Don't be cynical,' Judge Coates said. 'A cynic is just a man who found out when he was about ten that there wasn't any Santa Claus, and he's still upset. Yes, there'll be more war; and soon, I don't doubt. There always has been. There'll be deaths and disappointments and failures. When they come, you meet them. Nobody promises you a good time or an easy time. I don't know who it was who said when we think of the past we regret and when we think of the future we fear. And with reason. But no bets are off. There is the present to think of, and as long as you live there always will be. In the present, every day is a miracle. The world gets up in the morning and is fed and goes to work, and in the evening it comes home and is fed again and perhaps has a little amusement and goes to sleep. To make that possible, so much has to be done by so many people that, on the face of it, it is impossible. Well, every day we do it; and every

day, come hell, come high water, we're going to have to go on doing it as well as we can.'

'So it seems,' said Abner.

'Yes, so it seems,' said Judge Coates, 'and so it will be! And that's where you come in. That's all we want of you.'

Abner said, 'What do you want of me?'

'We just want you to do the impossible,' Judge Coates said.

As it should be, in places, the book is slow; it is heavy; it is hard reading. In other places, it is light; it is easy reading; it is fun. This is good: balance is here. Dickens brings us the case of poor Mr. Pickwick. You will enjoy again that tremendous argument between Webster and Satan over Jabez Stone. The trial of Sir Walter Raleigh will anger you in the obvious absence of impartiality. Cardozo's *Law and Literature* is profound.

This book, despite its deceptive title, should be in the personal home library of every member of the Bar. Lawyers will cherish this anthology. I heartily recommend it.

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